TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901. 1902.

No. 245. 145.

GUSTAVUS LEACH, WILLIAM F. LEACH, CHESTER H. SHAW, ET AL., PLAINTIFFS IN ERROR,

vs.

CHARLES R. BURR, EXECUTOR, AND SAMUEL H. LUCAS.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JULY 26, 1901.

(18,238.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 385.

GUSTAVUS LEACH, WILLIAM F. LEACH, CHESTER H. SHAW, ET AL., PLAINTIFFS IN ERROR,

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CHARLES R. BURR, EXECUTOR, AND SAMUEL H. LUCAS.

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1 In the Court of Appeals of the District of Columbia.

GUSTAVUS LEACH ET AL., Appellants,
vs.
CHARLES R. BURR, Executor, ET AL. } No. 997.

In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

In the Matter of the Estate of EZRA W. LEACH. Adm. Doc. —. No. 7571.

Petition.

The petition of Charles R. Burr respectfully represents:

1. He is a citizen of Anacostia, District of Columbia, and files this petition by right of his appointment as executor, as hereinafter shown.

2. That Ezra W. Leach, late a citizen of Anacostia, in the said District, departed this life therein heretofore, to wit, on the twenty-first day of December, A. D. 1896, leaving a last will and testament dated the said twenty-first day of December, A. D. 1896, which is herewith filed for probate and record.

3. The said testator died seized and possessed of the following real estate situated in the said Anacostia, namely, lot numbered one hundred and thirty (130), in Uniontown, now Anacostia, District of Columbia; part of lot seven (7) and all of lot six (6), in section nine (9), of the subdivision of Barry farm, and lots four hundred and twenty-three (423), four hundred and twenty-four (424), and four hundred and twenty-five (425) of Anacostia, formerly known as Uniontown, of the estimated value in all of about eight thousand (8,000) dollars, and also the following personal property: Household effects worth about $50, promissory notes secured on real estate in the sum of $200, and money in bank, about $40.

Your petitioner has no certain knowledge touching the heirs-at-law and next of kin of the said Ezra W. Leach, but shows to the court that Gustavus Leach, William F. Leach, Chester H. Shaw, George L. Shaw, Francis H. Hunt, and Howland L. Hunt, of Weymouth, Massachusetts; Alice O. McNeil and Emma G. McNeil, of the county of Plymouth, in the State of Massachusetts; Annie O. Hunt, of Cumberland, Maine; Edward E. Hunt, of the county of Orange, in the State of Vermont; James E. Watson, Jr., Archelaus L. Reed, of Fall River, Massachusetts; Judson Hunt and Howland A. Hunt, of Suffolk, Massachusetts; Arthur E. Hunt, of the city and State of New York; Cyrus R. Reed and Gustavus L.
2 Reed, of Bristol, Massachusetts; William W. Hunt, Ann H. Presbrey, Howland L. Hunt, Luke R. Watson, Jane E. Closson, Mary Wood, Mine Bowker, and Ada Reed Edy are or claim to be the heirs-at-law or next of kin of said testator, being or claiming to be, as your petitioner is informed and believes, and therefore avers, cousins of the said testator, and all of them of full age.

Your petitioner is the executor named in the said last will and testament, and as such believes himself entitled to letters testamentary thereunder.

Wherefore, the premises considered, your petitioner prays that the said paper-writing bearing date the twenty-first day of December, A. D. 1896, be admitted to probate and record and letters testamentary thereunder granted to your petitioner.

CHAS. R. BURR.

DISTRICT OF COLUMBIA, *ss:*

I, Charles R. Burr, on oath say that I have read the foregoing petition by me subscribed and know the contents thereof, and that the matters and things therein set forth are true to the best of my knowledge, information, and belief.

CHAS. R. BURR.

Subscribed and sworn to before me this 24th day of June, A. D. 1899.

RUTLEDGE WILLSON,
[SEAL.] *Notary Public.*
J. J. DARLINGTON, *Solicitor.*

(Endorsement: Petition for granting letters testamentary and probate of will. Filed July 5, 1899.)

In the Supreme Court of the District of Columbia, Holding a Session for Orphans' Court Business.

In re Estate of EZRA W. LEACH. No. 7571, Ad. D. 23.

Now come the heirs-at-law of said decedent, through their attorney, J. H. Adriaans, and for answer to the petition filed herein on the 5th day of July, 1899, praying the probate of an alleged will of said decedent, say, without waiving their right to an adjudication of the respective motions filed by them on the 7th day of July, 1899, and the 7th day of August, 1899, that the said petition of July 5, 1899, does not substantially differ from a similar petition from the same source filed herein on the 7th day of January, 1897.

That publication was duly had on said latter petition, and the said heirs-at-law filed caveats thereto on the 12th day of February, 1897. They still stand by their said caveats, and have the same objections to the allowance of the petition filed July 5, 1899, as they had to the petition filed January 7, 1897. Issues were framed
3 in this court on said caveats on the 9th day of April, 1897, and docketed in the circuit court, as law 40978, on the 26th day of April, 1897; that a jury was sworn to try said issues on the 1st day of June, 1899, and, under instruction of the court, returned a verdict sustaining the will, but no judgment or decree of this court has been entered on said verdict. The testimony taken at the trial disclosed that the issues, as framed, did not truly represent the differences between the parties, but the trial jus-

tice refused to remand the issues to this court for amendment. As those issues only related to the personalty of said estate, the realty thereof was not thereby affected.

Further answering said petition of July 5, 1899, respondents say that the decedent, at the time of signing said alleged will, had no testamentary capacity; that prior thereto he had been subjected to threats, menaces, and duress exercised over him by Samuel H. Lucas, the beneficiary thereof, when decedent was too feeble to resist them; that at the time of signing said alleged will he did not own the property sought to be transmitted thereby, for that it had been disposed of by a previous deed; that said will does not contain the last wishes and will of said decedent; and for other and further reasons said will should be denied probate and the petition of July 5, 1899, dismissed.

JOHN H. ADRIAANS,
Attorney for Heirs-at-law.

August 30, 1899.

(Endorsement: Answer of heirs-at-law to petition for probate of will. Filed August 30th, 1899.)

In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

In re Estate of EZRA W. LEACH, Deceased. No. 7571, Ad. Doc. 23.

Answer to Caveat.

Charles R. Burr, the executor named in the will of the above-named decedent, and Samuel H. Lucas, for answer to the caveat filed in the above-entitled cause, say as follows:

They refer to and make part of this answer, in so far as the same may be material, their answer, filed herein on the 19th day of March, 1897, to the original caveat filed herein.

Further answering the said caveat, they deny the material allegations thereof and each and every of them, and aver the facts to be that the said paper-writing dated December 21st, 1896, is the last will and testament of the said Ezra W. Leach, deceased; that at the time of its execution the said Ezra W. Leach was of sound and disposing mind and capable of executing a valid deed or contract; that the said paper-writing was not executed under the influence, importunities, or persuasions of Samuel H. Lucas or any other person or persons, but was the free and voluntary act of the said testa-
4 tor; that said paper-writing was not executed under compulsion or threats, menaces, or duress inflicted upon the said Ezra W. Leach by Samuel H. Lucas or any other person or persons, as alleged, and that the said paper-writing was not procured by the fraud, misrepresentations, or artifice of Samuel H. Lucas or any other person or persons.

These respondents are willing that issues may be framed and tried

before a jury, according to law, so to determine the truth of the allegations of the said caveat.

CHAS. R. BURR.
SAMUEL H. LUCAS.

J. J. DARLINGTON,
Sol. for Respondents.

DISTRICT OF COLUMBIA, *ss:*

We, Charles R. Burr and Samuel H. Lucas, on oath say that we have read the foregoing answer by us subscribed and know the contents thereof; that the allegations therein set forth as of our own personal knowledge are true, and those set forth upon information and belief we believe to be true.

CHAS. R. BURR.
SAMUEL H. LUCAS.

Subscribed and sworn to before me this 10th day of October, A. D. 1899.

M. J. GRIFFITH,
[SEAL.] *Notary Public.*

(Endorsement: Answer to caveat. Filed Oct. 19, 1899.)

(Endorsement: Issues to be tried by jury. Filed Nov. 3, 1899.)

In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

In re Estate of EZRA W. LEACH, Deceased. No. 7571.

Issues.

Upon consideration of the caveat filed in the above-entitled cause and of the answer thereto, it is by the court, this 3d day of November, A. D. 1899, ordered that the following issues be, and they hereby are, ordered for trial by jury in this court:

1. Was the said Ezra W. Leach, at the time of the execution of the said paper-writing of December 21st, 1896, offered for probate and record as the last will and testament of the real estate of Ezra W. Leach, of sound mind, capable of executing a valid deed or contract?

2. Was the paper-writing bearing date the 21st day of December, A. D. 1896, and offered for probate and record as the last will and testament of the real estate of Ezra W. Leach, procured by the threats, menaces, and duress exercised over him by Samuel H. Lucas or any other person or persons?

3. Was the paper-writing bearing date the 21st day of December, A. D. 1896, and offered for probate and record as the last will and testament of the real estate of Ezra W. Leach, procured by the fraud of Samuel H. Lucas or any other person or persons?

The motion of the caveator to dismiss the petition for the trial of issues is overruled.

CHAS. C. COLE,
Asso. Justice.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In re Estate of EZRA W. LEACH, Deceased. No. 7571, Adm'n Docket —.

Come now the heirs-at-law of said decedent and move the court to revoke the order passed herein on the third day of November, 1899, approving issues to be tried by jury respecting the real estate of said decedent, and for cause thereof say that at the time the alleged will was filed herein the orphans' court of this District was without jurisdiction to admit to probate any will involving real estate, or to frame issues based thereon, and that the recent act of Congress enlarging the jurisdiction of said court did not apply to cases where the will was offered for probate anteriorly to the date of the passage of the said act, and hence could not operate thereon.

J. H. ADRIAANS,
Attorney for Heirs-at-law.

To J. J. Darlington, Esq., att'y for *attorney for* devisee and executor:

Take notice hereby that on Friday, the 10th day of November, 1899, at 11 o'clock a. m., or as soon thereafter as I can be heard, I will present the above motion to the justice presiding over the orphans' court for action.

J. H. ADRIAANS,
Attorney for Heirs-at-law.

(Endorsement: Motion to vacate order of Nov. 3, 1899. Filed Nov. 7, 1899.)

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In re Estate of EZRA W. LEACH, Dec'd. No. 7571, Ad. Docket 23.

Now come the caveators and move the court to amend the issues heretofore approved herein for trial by adding thereto as follows:

"4. Is the paper-writing dated December 21, 1896, offered
6 herein as the last will and testament of said Ezra W. Leach, a valid, operative instrument?"

JOHN H. ADRIAANS,
Att'y for Caveators.

To J. J. Darlington, Esq., att'y for caveatee:

Please take notice that I will call the above motion to the attention of the court (Mr. Justice Cole presiding) on Friday, the 23rd day of November, 1899, at 10 o'clock a. m., or as soon thereafter as counsel can be heard.

JOHN H. ADRIAANS,
Att'y for Caveators.

Motion overruled.

CHAS. C. COLE,
Asso. Justice.

(Endorsement: Motion to amend issues filed in this cause. Filed Nov. 24, 1899.)

In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

In re Estate of EZRA W. LEACH, Deceased. No. 7571.

Order Setting Issues for Trial.

Issues having been framed in the above-entitled cause for trial by jury, it is hereby ordered that the same be, and they hereby are, set for trial on the 3rd day of January, A. D. 1900, provided that ten days prior to the time of the said trial all of the heirs-at-law and next of kin of the decedent, with all persons claiming under the will, be each served with a copy of said issues and a notification of the time and place of the trial thereof.

CHAS. C. COLE,
Asso. Justice.

(Endorsement: Order setting issues for trial. Filed Nov. 24, 1899.)

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of EZRA W. LEACH, Deceased. No. 7571, Ad'n Docket 23.

And now comes some of the caveators herein, by their attorney, and move the court to alter the date fixed for the trial of the issues herein, and for cause thereof state that there has been no publication of the said issues, as by the statute in such cases is made and provided.

J. H. ADRIAANS,
Attorney for Certain Caveators—Gustavus Leach, Wm. F. Leach, Chester H. Shaw, George L. Shaw, Howland L. Hunt, Francis H. Hunt, Alice O. McNeil, Emma G. McNeil, Wm. W. Hunt, Edward E. Hunt, Judson Hunt, Howland A. Hunt, Arthur E. Hunt, Annie O. Hunt.

7 To J. J. Darlington, Esq., attorney for caveatee:

Take notice hereby that on Tuesday, the 2nd day of January, 1900, at 10 o'clock a. m., or as soon thereafter as I can be heard, I will present the above motion to Mr. Justice Cole for his consideration and action.

J. H. ADRIAANS,
Attorney for Certain Caveators.

(Endorsement: Motion to change date for trial of issues herein. Filed Dec. 27, 1899.)

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In re Estate of EZRA W. LEACH. No. 7571, Ad. Docket —.

This cause coming on to be further heard upon the caveators' motion to alter the date of trial of the issues heretofore fixed for January 3, 1900, in order to permit intermediate service by publication upon all of the next of kin, it is thereupon by the court, this 30th day of December, 1899, ordered that the issues in this matter be and they are set down for trial on the 19th day of February, 1900.

CHAS. C. COLE,
Asso. Justice.

(Endorsement: Order fixing date of trial of issues Feb. 19, 1900. Filed Dec. 30, 1899.)

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of EZRA W. LEACH, Deceased. No. 7571, Adm'n Doc. 23.

It appearing to the court that the notification as to the trial of the issues in this case relating to the validity of the paper-writing dated the 21st day of December, A. D. 1896, purporting to be the last will and testament of Ezra W. Leach, deceased, has been returned, as to James E. Watson, Jr., Archelaus L. Reed, Cyrus P. Reed, Gustavus L. Reed, Ann A. Presbrey, Luke R. Watson, Jane E. Closson, Mary Wood, Mina Bowker, Luke Nelson Reed, & Ada Reed Eddy, "Not to be found," it is this 26th day of January, A. D. 1900, ordered that the issues heretofore framed in this case be, and they are hereby, set down for trial on the 26th day of February, A. D. 1900, and that this order and a copy of said issues heretofore framed shall be published twice a week for four weeks in the Evening Star.

CHAS. C. COLE, *Justice.*

Attest: LOUIS A. DENT,
Register of Wills, District of Columbia.

(Endorsement: Order of publication of issues and notification of trial thereof. Filed Jan. 26, 1900.)

8 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In re Estate of EZRA W. LEACH, Deceased. No. 7571, Ad'n Docket —.

Come now the caveators and move the court to assign a new date for the trial of the issues framed herein, and for cause thereof

say that the requisite provisions as to publication by the statute in such cases prescribed have not been complied with.

J. H. ADRIAANS,
Att'y for Caveators.

To J. J. Darlington, Esq., attorney for caveatees:

Take notice hereby that on Friday, the 23rd day of February 1900, at 10 a. m., or as soon thereafter as I can be heard, I will, move the justice holding said court to consider and act upon above motion.

J. H. ADRIAANS,
Attorney for Caveators.

Motion overruled 23d Feb., 1900.

CHAS. C. COLE, *J.*

(Endorsement: Motion to reassign date of trial of issues. Filed Feb. 21, 1900.)

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of EZRA W. LEACH, Deceased. No. 7571, Adm. Doc. 23.

It appearing to the court that the notification as to the trial of the issues in this case relating to the validity of the paper-writing dated the 21st day of December, A. D. 1896, purporting to be the last will and testament of Ezra W. Leach, deceased, has been returned, as to James E. Watson, Jr., Archelaus L. Reed, Cyrus P. Reed, Gustavus L. Reed, Ann A. Presbrey, Luke R. Watson, Jane E. Closson, Mary Wood, Mina Bowker, Luke Nelson Reed, and Ada Reed Eddy, "Not to be found," it is, this 26th day of January, A. D. 1900, ordered that the issues heretofore framed in this case be, and they are hereby, set down for trial on the 26th day of February, A. D. 1900, and that this order and a copy of said issues heretofore framed shall be published twice a week for four weeks in the Evening Star.

CHAS. C. COLE, *Justice.*

Attest: LOUIS A. DENT,
Register of Wills, District of Columbia.

Filed November 3, 1899.

9 In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

In re Estate of EZRA W. LEACH, Deceased. No. 7571.

Issues.

Upon consideration of the caveat filed in the above-entitled cause and of the answer thereto, it is by the court, this 3d day of November, A. D. 1899, ordered that the following issues be, and they hereby are, set for trial by jury in this court:

1. Was the said Ezra W. Leach, at the time of the execution of the said paper-writing of December 21st, 1896, offered for probate and record as the last will and testament of the real estate of Ezra W. Leach, of sound mind, capable of executing a valid deed or contract?

2. Was the paper-writing bearing date the 21st day of December, A. D. 1896, and offered for probate and record as the last will and testament of the real estate of Ezra W. Leach, procured by the threats, menaces, and duress exercised over him by Samuel H. Lucas or any other person or persons?

3. Was the paper-writing bearing date the 21st day of December, A. D. 1896, and offered for probate and record as the last will and testament of the real estate of Ezra W. Leach, procured by the fraud of Samuel H. Lucas or any other person or persons?

CHAS. C. COLE,
Asso. Justice.

A true copy.
January 26, 1900.

Test: LOUIS A. DENT,
Register of Wills, D. C.

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Certificate of Publication.

CITY AND COUNTY OF WASHINGTON, *District of Columbia,* } *ss:*

On this 28th day of February, A. D. one thousand nine hundred, personally appeared before me, Cornelius Eckhardt, a notary public in and for the city and county aforesaid, J. Whit Herron, who, being duly sworn according to law, declares that he is the advertising manager of the Evening Star, a daily newspaper published in this city and county of Washington, District of Columbia, and that the advertisement of which the annexed is a true copy was published on the following dates: January 26, 30, February 2, 6, 9, 13, 16, & 20, 1900, at a cost of forty and $\frac{56}{100}$ ($40.56) dollars.

J. WHIT HERRON,
Advertising Manager the Evening Star.

Sworn and subscribed to before me this 28th day of February, A. D. one thousand nine hundred.

CORNELIUS ECKHARDT,
[SEAL.] *Notary Public.*

10 (Endorsement: Proof of publication. Filed Mar. 1, 1900.)

In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

In re Estate of EZRA W. LEACH, Deceased. No. 7571.

Stipulation.

It is hereby stipulated between counsel that the depositions of Rev. Hugh T. Stevenson and A. M. Green, witnesses to the will of the above-named decedent, heretofore taken in this cause on behalf of the caveatee, and the depositions of the witnesses taken in Boston in law cause No. 40978, in the supreme court of the District of Columbia, on behalf of the caveators, may be read at any hearing of the above-entitled cause as if taken therein, and also in law cause No. 43370, in the supreme court of the District, subject, nevertheless, to all just exception to the relevancy, competency, and admissibility of such evidence.

J. J. DARLINGTON,
For Caveatee.
J. H. ADRIAANS,
For Caveators.

March 1, 1900.

(Endorsement: Stipulation. Filed Mar. 1, 1900.)

(*Extract from Proceedings—J. N. McG.* 29, *f.* 448.)

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of EZRA W. LEACH, Deceased. No. 7571, Admr. Doc.

John H. Adriaans, att'y for caveators.
Joseph J. Darlington, att'y for caveatees.

It is, this 5th day of March, 1900, by the court, upon the consideration thereof, ordered that the caveators, Gustavus Leach, William F. Leach, Chester H. Shaw, George L. Shaw, Howland L. Hunt, Francis H. Hunt, Alice O. McNeil, William W. Hunt, Emma G. McNeil, Edward E. Hunt, Judson Hunt, Howland N. Hunt, Arthur A. Hunt, Cyrus P. Reed, and Gustavus L. Reed, be, and they are hereby, made plaintiffs, and Charles R. Burr (named as executor in said will) and Samuel H. Lucas, caveatees, be, and they are hereby, made defendants in the trial of the issues in this cause.

Jury sworn and respited until tomorrow, Tuesday, March 6, 1900, at 10 o'clock a. m.

11 *Petit Jury.*

Oliver F. Miller.
William P. M. King.
Walter Burgess.
George E. Barker.
William B. Becker.
Harry E. Weeks.
William W. Riley.
John L. Grundling.
William M. Plummer.
Franklin P. Dove.
John Garden, Jr.
Julius W. Tolson.

CHAS. C. COLE, *J.*

(*Extract from Proceedings—J. N. McG.* # 29. *f.* 449.)

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

TUESDAY, *March* 6, 1900.

In the Matter of the Estate of EZRA W. LEACH, Deceased. No. —.

John H. Adriaans, att'y for caveators.
Joseph J. Darlington, att'y for caveatees.

Now come again the parties aforesaid in the manner aforesaid and the same jury that was respited yesterday, and after a further hearing of the case the court ordered that they return a verdict sustaining the will.

Issues not signed.

And the court adjourned until tomorrow, Wednesday, March 7, 1900.

CHAS. C. COLE, *J.*

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In re Estate of EZRA W. LEACH, Dec'd. No. 7571, Ad'n Docket —.

Now come the caveators and move the court to set aside the verdict of the jury herein rendered and to grant them a new trial, and for cause thereof say:

1. That the court was without jurisdiction to try the issues framed herein for want of due publication against certain heirs of the decedent.

2. That the court could only acquire jurisdiction to try said issues as respects said heirs after publication twice a week for four weeks of a copy of the issues and notice of trial, according to the statute.

3. That in the present cause the publication was made once a week for two weeks and twice a week for three weeks only.

4. That the court erred in taking the cause from the jury at the close of the caveators' evidence-in-chief.

5. That the court erred in permitting a hypothetical question to

be submitted to the medical experts adduced by caveators
12 without thereafter requiring the caveatees to adduce evidence tending to show the condition indicated in the said hypothesis existed in fact in the case at bar.

6. That the court erred in its instructions to the jury during the trial of said cause.

7. That the court erred in instructing the jury to answer the issues in favor of the caveatees.

8. That the court erred in refusing to give caveators opportunity to produce the attending physician of the decedent to prove the cause of death, the said physician having been summoned by the caveatees and having been in attendance during the trial, but temporarily absent at the required moment, being close to the usual hour of adjournment for the day.

9. The court erred in excluding from the jury as *prima facie* evidence of the cause of death of the decedent a certificate of the health officer of the District of Columbia, under his seal, containing such information.

10. That the court erred in refusing to permit said certificate to be read for some purposes, although permitted for other purposes, and in refusing to admit said certificate in evidence as to the cause of death.

L. A. BAILEY,
J. H. ADRIAANS,
Attorneys for Caveators.

(Endorsement: Motion for new trial. Filed Mar. 8, 1900.)

In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

In re Estate of EZRA W. LEACH. No. 7571.

Order.

The issues certified to the supreme court for trial by jury under an order passed herein on the 1st day of June, 1899, under the caveat to the will of Ezra W. Leach, filed by Cyrus P. Reed, Gustavus L. Reed, Gustavus Leach, William F. Leach, Chester H. Shaw, George L. Shaw, Howland L. Hunt, Francis H. Hunt, Alice O. McNeil, Emma G. McNeil, William W. Hunt, Edward E. Hunt, Judson Hunt, Howland A. Hunt, and Arthur E. Hunt, having been found in favor of the said will, as appears to the satisfaction of the court by the answers of the jurors to the said issues, certified by the clerk, and filed herein, it is by the court, this 17th day of March, A. D. 1900, adjudged, ordered, and decreed that the paper-writing bearing date the 21st day of December, 1896, purporting to be the last will and testament of Ezra W. Leach, be, and the same hereby is, admitted to probate and record, and that letters testamentary upon the estate of the said decedent do issue to Charles R. Burr, the executor therein named, upon his giving bond in the penalty of five

hundred dollars, conditioned for the faithful performance of
13 his trust; and it is further adjudged, ordered, and decreed that the said Charles R. Burr, the executor, as aforesaid, do recover against the said caveators the costs incurred under their said caveat; which costs are hereby taxed at the sum of $49.10 *dollars*, and that they have execution therefor as at law.

And the said paper-writing bearing date the said 21st day of December, 1896, having been further offered as a will of real estate, as provided by law, and it appearing to the satisfaction of the court that the issues framed upon the caveat filed against the admission of the said paper-writing for probate and record as prayed have been determined in favor of the said will at the trial thereof before a jury, after due proof of the notice of publication required by the order of the court, and no other further issues having been demanded by any party in interest, after due opportunity afforded therefor, and the motion of the caveator for a new trial having been heard and overruled, it is by the court, this 17th day of March, A. D. 1900, further adjudged, ordered, and decreed that the said paper-writing be, and the same hereby is, admitted to probate and record as the valid last will and testament of the said Ezra W. Leach, duly executed to pass real estate of the said testator within said District; and it is further adjudged, ordered, and decreed, that the said Charles R. Burr, executor, as aforesaid, do recover against the said caveators the cost of the proceedings to determine the validity of the said will as a will of real estate, which *are* hereby taxed at the sum of $128.24 *dollars*, and that he have execution therefor as at law.

CHAS. C. COLE, *J.*

(Endorsement: Order admitting will to probate and record. Filed Mar. 17, 1900.)

In the Supreme Court of the District of Columbia.

In re Estate of EZRA W. LEACH, Deceased. No. 7571, Ad'n Docket —.

Now come the caveators and move the court to set aside the judgment admitting to probate the alleged will of said decedent, and to dismiss the petition praying therefor, notwithstanding the verdict of the jury, and for cause therefor say that it appears by the deposition of the witness Stevenson, adduced by the caveatees, that on the same day of the execution of the alleged will, but prior thereto, the said decedent signed, acknowledged, sealed, and delivered a deed conveying the same property mentioned in said will, and did not die seized and possessed of said property. Wherefore the said alleged will is inoperative, null, void, and incapable of transmitting title to said property and ought not to be admitted to probate and record as a will of real estate.

J. H. ADRIAANS,
L. A. BAILEY,
Attorneys for Caveators.

14 (Endorsement: Motion to deny probate of will notwithstanding verdict of jury and to vacate judgment. Filed Mar. 17, 1900.)

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In re Estate of EZRA W. LEACH. No. 7571, Ad. Docket 23.

This cause coming on to be further heard upon the caveators' motion to set aside the order probating the will herein, to deny probate thereof, and to dismiss the petition praying therefor notwithstanding the verdict of the jury, it is, upon consideration thereof, by the court, this 24th day of March, 1900, ordered that the said motion be, and the same hereby is, overruled; and the caveators praying an appeal to the Court of Appeals from the order admitting said will to probate and record, the said appeal is hereby allowed and the penalty of the bond for the appeal is hereby fixed at one hundred (100) dollars.

CHAS. C. COLE, *J.*

(Endorsement: Order overruling motion to vacate probate of will, allowing appeal, and fixing bond at $100. Filed Mar. 24, 1900.)

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In re Estate of EZRA W. LEACH. No. 7571, Ad. D. —.

Upon application of the caveators, it is, this 2nd day of April, 1900, ordered that the term be extended in this cause for ten days from this date for the purpose of settling a bill of exceptions.

CHAS. C. COLE,
Asso. Justice.

(Endorsement: Order extending term to settle bill of exceptions. Filed Apr. 2, 1900.)

In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

GUSTAVUS LEACH ET AL.
vs.
CHARLES R. BURR, Executor, and SAMUEL H. Lucas. } No. 7571, Ad. 23.

Bill of Exceptions.

On the 26th day of February, 1900, the court being engaged in the trial of another cause, the trial of said issues was postponed until March 5th, 1900. On the 5th and 6th days of March, 1900, a jury was sworn to try said issues. Upon motion in that behalf

made, the court ordered, without objection, that in the align-
15 ment the caveators, as heirs of decedent, should be plaintiffs, and the caveatees, as devisees, defendants. Thereupon the caveators called to the witness stand one LYMAN B. CUTLER, who testified that he knew decedent prior to 1885; that decedent and Lucas, the beneficiary of the will, lived in one house, no one else living there; that Leach was white and Lucas colored. Witness was about to express an opinion as to decedent and state facts based upon intercourse with him at that time, when the court excluded the testimony because too remote and directed witness to retire until or unless evidence as to a later period was first introduced.

Upon the same ground the testimony of one Joseph S. Tucker, who testified that he knew decedent in the Washington navy yard about 1884, was excluded under a similar ruling.

Caveators thereupon read from depositions taken in Boston (in law 40978, between the same parties, permitted to be read herein by stipulation) under a commission duly issued from this court, the deposition of one WARREN W. RAWSON, who testified substantially as follows: That decedent visited him in July, 1895, at 34 South Market street, Boston, Mass., on the subject of obtaining information relative to building a green-house, and perticularly as to the use of electricity in that connection; that witness explained to decedent that he found that the growth of plants was accelerated by the use of electric light; that decedent had an impression that the electricity was used for heating purposes, and that decedent throughout the conversation indicated that he thought witness was deceiving him as to the application of electricity. Decedent said (p. 3, Dep.) "that he did not run his houses himself; that he had a colored man that run them for him." I don't remember how long he said he had been in business, but he wanted to get what information he could to assist the colored man.

"Q. How long did he stay with you at that time? A. From half to three-quarters of an hour.

"Q. During that time how long were you in conversation with him? A. Nearly all of it. I was with him all the time showing him around and he asking me questions.

"Q. Did you ever know him after that? —. No, sir.

"Q. During the time that you knew him did you form any opinion as to the mental condition of the man? A. I did.

"Q. Will you please state what it was? A. I thought he was a very peculiar man.

"Q. Please state upon what facts you base that conclusion. A. He asked me peculiar questions and still would repeat questions that he had formerly asked—asked me them again; and why I state this is because I remarked it to my wife as soon as he went away.

"Q. Are you in any manner interested in the estate of said Ezra W. Leach? A. No, sir.

"Q. If there is anything further that you observed upon which

you based your opinion, will you please state it? A. No, sir; I do not know of anything special. P. 4. * * *

16 "Q. Can you recall any of Mr. Leach's questions which seemed to you peculiar? A. Well, no, sir; not exactly; only he used to repeat. Had this electric heating in his mind so much he used to repeat his questions; used to ask me over two or three times; that is all. I could not repeat them word for word; only I know the subject he was on; that is all. 5. * * *

"Q. Did it seem strange to you that a man who was in the flower business and had not used electricity in that connection should ask you questions concerning electricity that portrayed ignorance? A. It did not in one respect, only he acted peculiar about it.

"Q. Now, tell us in what respect he acted peculiar? A. Well, in repeating himself—not to remember—that is all. That case is like hundreds of others that come to see me in relation to facts of that kind, and he is only one of hundreds that come there." 6.

Witness, on being asked to state any facts showing Leach's peculiarities, stated that he could bring none to mind. 7.

"Q. How many times, if more than once, did he question you in regard to heating by electricity? A. Three or four times, sure, if not more." 8.

The witness RAWSON further testified that the testator appeared to believe that witness had some trade secret in relation to the effect of electric heating upon the growth of flowers, as many other persons did, and that the questions which were repeated were in relation to that subject.

One GEORGE E. FAIRBANKS also testified as follows:

(P. 10, Dep.): "That he knew Ezra W. Leach from 1850 to 1862 by working in the same shop with him; knew him thereafter when he enlisted in the army and went to the Watertown arsenal, and thereafter when he kept a drug store in Brighton; that witness visited Leach in Washington during the Grand Army encampment, and again saw Leach during the latter's visit to Boston in 1895; that Leach's mother was insane."

(P. 11, Dep.): "Q. State any fact within your knowledge as to the mental condition of Ezra W. Leach during his lifetime, and especially about the time of his death, December 21st, 1896." (P. 15, Dep.): "A. From the first time I knew—and all through he was always with eccentric ways about him. Q. State more particularly what they were. A. Well, he was pretty set in his disposition against anything that did not just exactly suit. I have known him—we used to attend the same church together, and there used to be a man come in and kind of talk that didn't belong to any church, and Ezra got right up in meeting and told him to sit down. Another time that they—the parson of the church and he—got into a little difficulty, and he got then a little considerable excited about it and displayed a great deal of eccentricity at that time; made considerable talk around the neighborhood" * * * (P. 17, Dep.)

In relation to the foregoing incident, the witness Fairbanks was interrogated and answered as follows:

17 "Q. State more particularly his appearance at this time, so far as you can. A. Well, I could not say exactly, only he acted like a man kind of excited. Q. When was this incident? A. That was just previous to the breaking out of the war. Somewhere about 1860, I suppose. P. 16. * * * Q. State any fact nearer to the time of his death than these you have just mentioned, if you have knowledge of any such facts. A. I cannot recall any. 17. * * * Q. He spoke of depositing some money he had to take care of the cemetery lot? A. Yes, sir; he spoke of that when he was on to the Christian Ende-vorers. Q. You did not doubt his ability to do that if he wanted to? A. No, sir; he could if he wanted to. Q. You saw no lack of mental ability to do it if he wanted to? A. Not then. Q. Did you ever at any time? A. Well, not really; as I say, he was a little eccentric occasionally at times. 21. * * * Q. You had no doubt that Mr. Leach had sufficient mental and business ability to make the contract? A. Yes, sir. Q. You never doubted that, did you? A. No."

In reference to the incident testified to by him, at which the testator told a man at a meeting of the church to sit down, the witness further testified that the man in question was one who ridiculed everything of a religious nature, and who was coming to the meeting in question and inducing a gang of young men to come, pretending to be interested, but really for the purpose of making sport.

"Q. You have testified that you have visited Mr. Leach at his house in the District of Columbia about four years ago. Will you state particularly what occurred while you were there, and especially as to the relation he sustained to the boy Lucas, named in his will as beneficiary. A. I don't know as I can recall any; they seemed to be very pleasantly together; I used to see them around the place around the green-house. Q. Saw whom? A. Mr. Leach and Mr. Lucas. Q. What was his mode of life there? A. Well, Mr. Leach used to do most of the cooking; I should call it a very simple and plain mode of living. Q. What did Mr. Lucas do? A. Mr. Leach told me that Lucas used to go into the market with cut flowers a couple of times a week, I think he said. * * * (P. 20, Dep.) Q. State whether you are in any manner related to the testator or interested in his estate. A. No, sir; not at all."

WILLIAM FRANCIS LEACH testified that he is a cousin of decedent. * * * (P. 47, Dep.) "Q. How did he (Leach) say he (Lucas) happened to come to live with him? A. I can tell the story as he told it? Q. Yes. A. He said the boy come to him, and he was hungry, and he gave him something to eat, and he said that there was a large family and said to him, 'Why don't you come over and live with me?' The boy came and lived with him ever afterward."

One LOIS C. CUSHING also testified substantially as follows (p. 56, Dep.): That witness was 76 years old on the 6th day of June,
18 1897; that she knew Ezra W. Leach from her earliest recollection; was related to him on his mother's side, but is not interested in his estate * * * (p. 57, Dep.); saw Mr. Leach last during the Christian Endeavor meeting in Boston, in 1895. He then stayed two weeks with witness. * * * (P. 58, Dep.)

The witness was further interrogated, and answered as follows:

"Q. During the time that you have known him will you state any facts within your knowledge that will tend to throw light upon his mental condition? A. No; I never saw any change in him. He always was just the same from the time he was born until he died. Q. Whether or not you ever observed anything about him other than normal, so far as his mental condition was concerned? A. No. Q. You never did? A. No. 57–'8. * * * Q. What was her (Leach's mother) mental condition during her life? A. She was partially deranged. Q. For how long a time? A. Well, I do not know that. I remember when she wasn't. It was sort of what the doctors would call nervous prostration. Q. State whether or not it affected her mind, so far as you observed. State facts—that is, I do not want opinion. A. Well, she was nervous. She was never violent at any time, but a sort of a nervous restlessness. She was sane. She was so she could go visiting friends—go out at different times. She was not right. There was something about her—still nothing violent like an insane person. 58. Q. It was not inherited? A. Oh, no. Q. Before Ezra W. Leach died and this question about his property arose, did you ever hear anybody question his mental condition? A. Oh, not at all. Q. That has all grown up since this suit begun, hasn't it? A. Oh, I never heard any question of his mental condition. I never seen any change in him from the time I was born until he died. I used to see a great deal of him. * * * Q. Mrs. Cushing, what do you mean when you say Ezra Leach was as firm as a rock? A. Well, he never was offended, whatever was said to him. He never would take any offense at it. I never saw him in ill temper or anything of that kind. Q. He was set on standing to his own opinions? A. Yes; he would stand to his own opinions. Q. Not easily influenced? A. Yes. Q. Not easily influenced? A. Oh, no; he was very firm."

"Mr. Leach's mother was partially deranged, but not violent." * * * (P. 61, Dep.) "Did he have any conversation about his home in Washington? A. None. Q. Did he say with whom he lived in the house there? A. He spoke of his home, and said he was living there with that boy; they kept house together; said he took care of himself, and when he wanted his meals he got them, and when Sam. wanted his he got his, and then he would take his paper and go out and read; then Sam. would come home from market; and I says, 'Well, being interested in the flower business, Ezra, how much does that green-house pay you?' He says, 'I know nothing about it. I don't know nothing about it. I don't know whether Sam. gets one dollar or fifty.' I says,

'Why, do you let him do that way?' He says, 'Yes.' I says,
19 'Don't he give any account of what he sells?' He says,
'No.'" * * * (p. 62, Dep.) "Q. Did he have any conversation in regard to leaving his property to colored people? If so, state when and what it was. A. I said to him one day—said I, 'Now, Ezra, I hope you are not going to leave all your property to them negroes.' 'Oh,' he said, 'they are not fit to have money.' He says, 'They will sing and dance all night when they have not got a mouthful for breakfast.' He says, 'They don't know the use of money.' Q. Whether or not he had any conversation with you in regard to the boy Lucas in that particular? A. No; he didn't. He said he was a very smart boy; said that he came there as a little beggar boy; he came there and said he was hungry, and he gave him food, and stayed with him two or three days, and there was a very large family of children, and he said to him, 'Now, Sam., you had better stay here with me,' and he said he stayed right from that with him."

That Lucas was about to get married; that he was to bring his wife to testator's home to live, and that he, the testator, proposed to enlarge his house to accommodate them if necessary.

Thereupon caveators introduced evidence, which was admitted, transcript No. 1315, of record No. 111,295, of the health department, D. C., duly signed and sealed by the acting health officer and register, in the words and figures following:

Transcript No. 1315. Record No. 111,295.

HEALTH DEPARTMENT,
DISTRICT OF COLUMBIA,
WASHINGTON, *December 28th*, 1899.

A Transcript from the Record of Deaths in the District of Columbia.

Name of deceased: Ezra W. Leach.	Date of death: December 21st, 1896.	Age of deceased: 73 yrs. — mos — days.
Color, sex, social condition, and occupation: White, male, single.	Birthplace: Massachusetts.	How long a resident in District of Columbia: 20 yrs. — mos. — days.
Cause of death: Broncho-pneumonia.	Place of death: Hillsdale, D. C.	Duration of last sickness: Eight days.
Place of burial: Arlington National cemetery.	Medical attendant: R. A. Pyles, M. D.	Undertaker: Thos. F. Murray.

A true copy.
[SEAL.] (Signed) H. C. McLEAN,
Act'g Health Officer and Registrar.

Correct.
(Signed) WM. B. MOORE,
Statistician.

Attest:
(Signed) W. C. FOWLER, M. D.,
Act'g Chief Clerk.

20 Thereupon caveators called to the stand successively Drs. Clifton Mayfield, Irving C. Rosse, J. Remsay Nevitt, Frank P. Vale, Charles M. Emmons, William V. Marmion, and A. B. Richardson, who, upon a hypothetical question submitted by caveators, substantially concurred that it was contrary to their experience and reading that a man of the age of 73 years dying of acute pneumonia should have testamentary capacity between three and four hours before death. Upon a hypothetical question embodying the facts testified to by the witness Stephenson, submitted by the caveatees, said experts substantially agreed that the condition of capacity at that time implied in the hypothesis would be rare and exceptional, and[d] some of them maintained it was impossible. Dr. Marmion further testified that he personally made a physical examination of decedent upon an application *of* increase of pension at the instance of the Pension Office, and thus found that decedent suffered from rheumatism, inguinal hernia, cardiac hyper*th*rophy, and senile debility; that pension certificate No. 522,949 was granted to decedent based upon such examination by three physicians employed by the Pension Office, of whom witness was one; that in the opinion of witness the cardiac hyper*th*rophy and senile debility, when combined with acute pneumonia, would so tend to impair the mind as to render it incapable of intelligently acting upon a question of the disposition of property or of making a valid deed or will in the last stage of illness.

Dr. A. B. RICHARDSON testified that the unconsciousness preceding death from acute pneumonia was not characteristic of death from bronchial pneumonia, and that, in his opinion, if the testator himself dictated the terms of the will and himself suggested the legal obstacle to giving the property to the church, as testified by Stevenson, this would show that he was not laboring under mental disability, and that, especially, his initiative action in suggesting the legal difficulty in question and the means of obviating it would tend to show that there was not mental inability to make a valid deed or contract.

Caveators thereupon offered in evidence the paper-writing offered as the will of decedent, which is in words and figures as follows, to wit:

"*Will.*

I, Ezra W. Leach, being of sound mind and memory, make, publish and declare this to be my last will and testament.

I give and bequeath all the real and personal property of every kind and description wheresoever situated that I now possess to Samuel H. Lucas of Hillsdale, D. C.

I hereby name and appoint as executor of this my last will and testament Charles R. Burr of Anacostia, D. C.

Signed, sealed and delivered to my executor Charles R. Burr, in presence of the subscribing witnesses, each of whom sub-

21 scribed his name in the presence of the other this 21st day of December, 1896.

E. W. LEACH.

Witnesses:

H. T. STEVENSON,
40 Grant Street, Anacostia, D. C.

D. FRAZIER,
Howard Avenue, Anacostia, D. C.

R. A. PYLES,
Anacostia, D. C.

A. M. GREEN,
Anacostia, D. C."

Caveators thereupon offered to prove by fifty conveyances from the land records of D. C., produced in open court, to and from the decedent that he uniformly signed his name "Ezra W. Leach" and had conveyances to him made out "Ezra W. Leach." The caveatees in open court conceded the fact, rendering the proof unnecessary. The caveators offered to prove that the pension application was also signed "Ezra W. Leach;" this was also conceded by caveatees, rendering the proof unnecessary. Caveators thereupon read so much of the deposition of one Hugh T. Stevenson, adduced as a witness by the caveatees, as tended to show that on the day of decedent's death a deed was prepared by witness conveying the same real estate mentioned in the will from decedent to the same Lucas mentioned as beneficiary in the will; said testimony is substantially as follows—6, Dep.:

"Pastor, I did not expect to go so early; there are some things which I wanted to perform and have neglected. I wanted to give the church a parsonage. I cannot do it now; it is too late. I will be unable on account of the laws of Maryland, which apply to the District of Columbia, to do anything of that sort, for they will not allow a man to do anything of that sort within thirty days of the time of his death. I want you to prepare the papers and turn everything over to Sam. Q. Who was Sam.? A. Samuel H. Lucas. I said, All right, sir; I will do the very best I can. I then went out and sent a boy, a colored boy, I think, and told him to take—that is my impression—a horse and go and get Dr. Green. Q. Dr. Green was a notary, was he? A. Yes, sir; he was a notary; he was a dentist by profession, but was engaged in the banking business. He is not practicing. I then asked if there was anything in the house in the form of a deed, and after much search I found one in a trunk, I think, in the room in which the Dr. was. I then asked for the ink, and the Dr. ordered Lucas to get me the ink. I went into the kitchen and drew up the document to the best of my ability. I am not an expert in that business, and never drew up a paper of that kind before. In the meanwhile Dr. Green came in and I turned it over to him, and asked him if he had not better read it over, which he did. We then went into the Doctor's room and the Doctor

22 got up. Q. Sat up? A. Yes, sir; he sat up. I think he was aided to sit up by having pillows placed behind him. He

signed it, and in the meanwhile Dr. Pyles came in. Dr. Pyles was his family physician and had come in to see him. Q. Had Mr. Burr arrived at that time? A. Mr. Burr came in later. After I got through it occurred to me that possibly I had made a mistake in preparing the paper, and I suggested to the Doctor that I may not have got everything in there just right, and if he wanted to make sure *he* could make a will if he wished. He then told Dr. Green to draw up a will, and he drew up the will, and while drawing it up he asked me whom he wanted for executor, and I came in and asked Dr. Leach whom he wanted, and he said, 'Charlie;' that is the name he always called Mr. Burr by at every meeting we had. I told Mr. Green, and he came in, and the will was given to me, and I read it over to Dr. Leach, and he said that was right. I read it over slowly, carefully, and distinctly, and after it had been read he said that was right and signed his name, and in doing so noticed that the will read 'Ezra W. Leach,' and he wrote 'E. W. Leach.' 'E. W.' will do, he said, for that is my name. Q. That was after he had signed the will? A. That was while he was signing it, that he noticed that he had written 'E. W.' instead of 'Ezra W.' After that the witnesses signed, and the will was turned over to Mr. Burr, who was appointed the executor." * * * (P. 10, Dep.) "Q. You say he, 'Green,' took an oath. You mean he took an acknowledgment to the deed, don't you? A. Yes, sir; he took an acknowledgment to the deed, but at that time he (Green) did not affix his seal, as he said it was unnecessary, but that he would affix it at his office." * * * (P. 11, Dep.) "Q. What, if anything, did Lucas do in connection with the instruction for the deed or will? A. He was not present; he was not present when any suggestion was made; he was present when Dr. Leach told me to turn everything to him and draw up the papers accordingly; he told Sam. what he would like to have done in reference to the parsonage of the church." * * * (P. 12, Dep.) "Q. So that the writing of these papers was done about 9 o'clock? A. Yes, sir; I should say between nine and ten o'clock. Q. And the deed was drawn up first by you? A. Yes, sir; it was. Q. Now what property was conveyed by the deed? A. Well, he told me to turn everything over. Q. Turn everything over that you knew about, real and personal property? A. I do not know about the personal property. Q. Did you describe any particular property or did you say what real estate? A. I tried to make an exact description. Q. Where is that paper now? A. I have been informed by Mr. Charles Burr, the executor named in the will, that it is in his possession. Q. It was signed and acknowledged, was it? A. Yes, sir; it was. Q. And the only thing, as I understand you, it lacked, was the seal at the time you saw it? A. Yes, sir. Q. That is, the notary did not put his seal on it at that time? A. I cannot say whether he had filled in the acknowledgment of the deed or not. Q. It was signed

23 and acknowledged by Dr. Leach in your presence, was it not? A. Yes, sir; it was. Q. Do you know whether it covered all the real estate owned by Dr. Leach? A. I do not know all the real estate owned by Dr. Leach; I tried to get everything in. Q. Now,

about this parsonage, you say it is the house Mr. Suit lived in, and that Dr. Leach intended to give it for a parsonage? A. That is exactly what he always said" * * * (P. 14, Dep.) "Q. Now, has there been any understanding between you, as pastor of the church subsequent to the death of Dr. Leach, that Lucas was to turn over that property to the church? A. No, sir; no understanding whatever. Q. Has there been any talk with you individually on that subject? A. No, sir; he never made me a promise as pastor of that church nor as an individual. Q. There has been some talk about it, has there not? A. He told the Doctor in my presence that he would carry out his wishes in the matter. Q. Lucas said that? A. Yes, sir; he did. Q. And if the will is sustained, you do expect him to turn the lot to the church, do you not? A. Why that is for him to say; I have got nothing to do with it. If I was in his position I would certainly do it. Q. Did you not just say that Lucas was not present when the will was drawn? A. I did, sir. Q. Well, how could Lucas know that Dr. Leach wanted the house to go as a parsonage of the church? A. This was in reference to the deed; he was present when the Doctor told me to draw up the deed, and he turned to Sam. and told him what he would have done; that was part of the conversation. Q. And it was the understanding, in so far as the Doctor was concerned, that the lot was to be turned over to the church? A. Yes, sir—that is, when the deed was drawn. Q. How about the will? A. Nothing was said. Q. What became of Lucas after the deed was drawn? A. Lucas went out into the kitchen before the deed was drawn, and never returned to the room until after the will was made and signed. Q. He was in the house? A. Yes, sir; he was." * * * (P. 17, Dep.) "Q. Now, between the time of the writing of the deed by you and the writing of the will, Mr. Burr had come in? A. Yes, sir; he had. Q. He was not there when the deed was acknowledged, was he? A. I am not certain about that; he was not there when Dr. Leach gave me the instructions. I had sent for Dr. Green, and Mr. Burr had been sent for by his wife. Q. About what time was there between the time of the preparation of the deed and the preparation of the will? A. Very little, sir. Q. All done within an hour, was it? A. Yes, sir. Q. As far as your recollection now serves you, was the description of the property any more accurate than that (handing witness the will)? A. What do you mean by any more accurate? Q. Did it describe the property differently? A. Yes, sir. Q. In what respect? A. I could not say; only that I tried to describe the property; that I know I had a deed, and my impression is that I included in it a clause that would cover everything; but I have not seen that paper from that day to this. Q. Did you try to describe by the number of the lots? A. I think in some cases where I found in
24 searching with Lucas a deed, I think I tried to utilize that—I cannot say as to the exact wording of that paper." * * * (P. 19, Dep.) "Q. You have said something about Lucas and yourself in searching for papers. Now, at whose instance was that? A. It was at my instance. I wanted something to draw up the deed by; I wanted something to guide me. Q. Did you ask Dr. Leach

whether he had any deeds or not? A. I asked Lucas where the papers were, and he said he could not tell exactly. Q. Where did Lucas live? A. In the same house with Dr. Leach. Q. How long had he lived there? A. Ever since I had known Dr. Leach. Q. That is about the middle of August, 1893, down to December, 1896? A. Yes, sir; I applied to him because he was an inmate there. Q. Who else lived there? A. He was the only one I knew of." * * * (P. 20, Dep.) "Q. Now, Mr. Stevenson, will you give me as nearly as you can the conversation between Dr. Leach and Lucas at which Lucas said he would carry out the Doctor's wishes? A. As I can recall it, it seems to me that Doctor said this: 'I wanted that house by Kenner's to be given t- the church for a parsonage. I cannot do it now. I would like to have you do it, Sam;' that was after he had already told me to draw up the paper. Q. What did Lucas say? —. Lucas said, 'Of course, Doctor, I will try and carry out your wishes.' Q. Did the Doctor tell him that he gave him in trust or on condition that he should give the property adjoining the Kenner property to the church? A. No, sir; he had already given me the directions for drawing up the deed before he said that."

HUGH T. STEPHENSON further testifies that at the time the will in controversy was made he was pastor of the Anacostia Baptist church, whose church Leach attended; that he was a witness to the will; was present at its execution; saw the other witnesses sign, and that the testator was of sound mind and capable of making a valid deed or contract at that time. He also testified that the testator, during all the time of his acquaintance with him, had been his chief adviser and counsellor in all church matters, having been one of the deacons of the church, a member of the board of trustees, a member of the finance committee, treasurer of the board of deacons, and held other offices during that time (from the middle of August, 1893, to the time of his death); that up to the time of his death he was a member of the executive committee of the Baptist denomination in the District of Columbia; that he was a man of excellent ability, considerable intelligence, and well competent to transact any business up to the very end of his life, and that witness observed no change in his business capacity, memory, and ability up to the time of his death, and that he died between twelve and one o'clock p. m. on the day the will was executed, December 21, 1896.

After reading the foregoing depositions the caveators announced to the court that they rested their case in chief.

Thereupon the counsel for the caveatees moved the court
25 to instruct the jury to find a verdict maintaining the will, inasmuch as the caveators had adduced no testimony entitling them to go to the jury. The court thereupon, notwithstanding the objection of the caveators, sustained the caveatees' motion and directed the jury to answer the first issue affirmatively and the other two issues negatively; to the granting of which motion the caveators objected then and there; but the court overruled said objection and granted the motion, and instructed the jury as prayed

in said motion; to the granting of which motion and to which instruction the caveators then and there noted an exception. The jury accordingly brought in a verdict as directed without leaving the box, and the caveators noted an exception in open court to the verdict and prayed the court to sign and seal this their bill of exceptions and make the same a part of the record in said cause, which is accordingly done, now for then, this 9th day of April, 1900.

[SEAL.] CHAS. C. COLE,
Asso. Justice.

(Endorsement: Bill of exceptions. Filed Apr. 9, 1900.)

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In re Estate of EZRA W. LEACH, Dec'd. No. 7571.

Now come the caveators and move the court to pass an order herein making the costs of the appeal allowed herein a charge upon the estate and payable from the assets thereof.

J. H. ADRIAANS,
Att'y for Caveators.

To J. J. Darlington, Esq., att'y for caveatees:

Take notice hereby that on Friday, the 13th day of April, 1900, at 1 o'clock p. m., I will present above motion to Mr. Justice Cole for action.

J. H. ADRIAANS,
Att'y for Caveators.

Service acknowledged this 10th day of April, A. D. 1900.
J. J. DARLINGTON,
Att'y for Caveatees.

(Endorsement: Motion to make costs of appeal a charge upon assets of above estate. Filed Apr. 10, 1900.)

26 In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

In the Matter of the Will of EZRA W. LEACH. No. 7571, Admr. Doc.

This cause coming on upon the motion of the caveators for an order making the costs of their appeal a charge upon the estate and payable from the assets thereof, it is by the court, this 23d day of April, A. D. 1900, upon consideration thereof, and after argument by the counsel for the caveators, ordered that the said motion be, and the same hereby is, denied.

CHAS. C. COLE, *J.*

(Endorsement: Order denying motion to make costs of appeal charge upon estate. Filed Apr. 23, 1900.)

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In re Estate of EZRA W. LEACH. No. 7571.

The register of wills will please prepare a transcript of the part of the record in the above-entitled cause hereinafter designated for transmission to the Court of Appeals D. C. as the basis of an appeal allowed herein:

Petition praying probate, filed July 5, 1899.
Caveat, filed August 30, 1899.
Answer to caveat, filed October 19, 1899.
Order framing issues, filed November 3, 1899.
Motion, filed November 7, 1899, and order passed thereon.
Motion, filed November 24, 1899, and order passed thereon.
Motion, December 27, 1899.
Motion of December 29, 1899.
Order of December 30, 1899, changing date of trial.
Order of publication, filed January 26, 1900.
Motion, filed February 21, 1900.
Proof of publication, filed March 1, 1900.
Stipulation of counsel, filed March 1, 1900.
Order making parties—Proceedings, 29, folio 448.
Order directing jury to sustain will—Proceedings, 29, folio 449.
Motion for new trial, filed March 8, 1900.
Order admitting will to probate, filed March 17, 1900.
Motion, filed March 17, 1900.
Order allowing appeal, filed March 24, 1900.
Order extending term, filed April 2, 1900.
Bill of exceptions, filed April 9, 1900.
Motion of April 10, 1900.
Order of April 23, 1900.
Order extending time to file transcript.

J. H. ADRIAANS,
Att'y for Caveators.
J. J. DARLINGTON,
Att'y for Caveatees.

27 (Endorsement: Agreement for transcript of record. Filed Apr. 23, 1900.)

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In re Estate of EZRA W. LEACH. No. 7571.

Upon application of the caveators, the caveatees consenting thereto, the time for filing the transcript of the record herein in the Court of Appeals is hereby, this 2d day of May, 1900, extended for fifteen days from the expiration of the time limited by the rules of said court, this order being passed upon the undertaking of the caveators that the record shall be printed and the cause made ready

for hearing in the Court of Appeals by the first Tuesday in June, 1900.

CHAS. C. COLE, *Justice.*

(Endorsement: Order extending time to file transcript for 15 days. Filed May 2, 1900.)

In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

DISTRICT OF COLUMBIA, *To wit:*

I, Louis A. Dent, register of wills for the District of Columbia and *ex officio* clerk of the said special term for orphans' court business, do hereby certify the foregoing to be a true copy of the original will of Ezra W. Leach, deceased, filed in the office of the register of wills for the District of Columbia aforesaid; also true copies of certain other papers and minutes on file in the office of the register of wills in case No. 7571, estate of Ezra W. Leach, deceased, the same constituting a full, true, and correct transcript of record of proceedings had in said cause, numbering from page ½ to page 52, inclusive.

In testimony whereof I hereunto subscribe my name and affix the seal of the said supreme court, special term for orphans' court business, this 8th day of May, anno Domini 1900.

[Seal Supreme Court of the District of Columbia, Probate Jurisdiction.]

LOUIS A. DENT,
Register of Wills D. C. and ex Officio Clerk of the Special Term for Orphans' Court Business.

[Ten-cent U. S. internal-revenue stamp, canceled May 23, 1900. L. A. D.]

28 In the Court of Appeals of the District of Columbia.

GUSTAVUS LEACH ET AL., Appellants,
vs.
CHARLES R. BURR, Executor, and SAMUEL H. LUCAS, Appellees. } No. 997.

It is hereby stipulated and agreed by and between Joseph J. Darlington, attorney for appellees, and John H. Adriaans, attorney for appellants, that the following portions of the transcript of the record certified by the register of wills shall be printed and constitute the record for determination by the Court of Appeals:

Pages 1 and 2, including names erased and without erasure marks, excluding the certificate on page 2.

Pages 3 to 27, both inclusive, without erasures and with substitutions, omitting page 13.

Omit erased portions on pages 28, 29, 30, except second sentence erased on page 30, and print that as though not erased.

Pages 31 to 38, inclusive. omit bracket and parentheses marks.

Page 39, omit erasures and bracket and parentheses marks.

Pages 40 to 44, inclusive.

Pages 45, 46, 47, omit erased portions.
Pages 48 to 52, inclusive.
Certificate of register of wills.

J. J. DARLINGTON,
Per R. B. B.,
Att'y for Appellees.
J. H. ADRIAANS,
Att'y for Appellants.

May 22, 1900.

(Endorsed:) Court of Appeals D. C., April term, 1900. No. 997. Gustavus Leach *et al.*, appellants, *vs.* Charles R. Burr, executor, and Samuel H. Lucas. Stipulation of counsel as to printing record. Court of Appeals, District of Columbia. Filed Jun- 2, 1900. Robert Willett, clerk.

Endorsed on cover: District of Columbia supreme court. No. 997. Gustavus Leach *et al.*, appellants, *vs.* Charles R. Burr, executor, *et al.* Court of Appeals, District of Columbia. Filed Jun- 2, 1900. Robert Willett, clerk.

29 WEDNESDAY, *October 10th, A. D.* 1900.

GUSTAVUS LEACH, WILLIAM F. LEACH, CHESTER H. SHAW, George L. Shaw, Howland L. Hunt, Francis H. Hunt, Alice O. McNeil, William W. Hunt, Emma G. McNeil, Edward E. Hunt, Judson Hunt, Howland N. Hunt, Arthur A. Hunt, Cyrus P. Reed, and Gustavus L. Reed, Appellants,
vs.
CHARLES R. BURR, Executor, and SAMUEL H. LUCAS. } No. 997.

The argument in the above-entitled cause was commenced by Mr. W. D. Davidge, Jr., attorney for the appellants, and was continued by Messrs. Rudolph B. Behrend and J. J. Darlington, attorneys for the appellees, and was concluded by Mr. W. D. Davidge, attorney for the appellants.

30 GUSTAVUS LEACH, WILLIAM F. LEACH, CHESTER H. Shaw, George L. Shaw, Howland L. Hunt, Francis H. Hunt, Alice O. McNeil, William W. Hunt, Emma G. McNeil, Edward E. Hunt, Judson Hunt, Howland N. Hunt, Arthur A. Hunt, Cyrus P. Reed, and Gustavus L. Reed, Appellants,
vs.
CHARLES R. BURR, Executor, and SAMUEL H. LUCAS. } No. 997.

Opinion.

Mr. Justice MORRIS delivered the opinion of the court:

This is an appeal from the supreme court of the District in a proceeding instituted in that court under the provisions of the act of Congress of June 8, 1898, entitled "An act conferring on the su-

preme court of the District of Columbia jurisdiction to take proof of the execution of wills affecting real estate, and for other purposes."

Prior to that act, the supreme court of the District holding a special term for orphans' court business and its predecessor in that regard, the former orphans' court of the District, had jurisdiction to take the probate of wills only in so far as they affected personal property, and to superintend the administration of such property. There was no authority in either to take the probate of wills so as to affect real estate.

This was left to the ordinary courts of general jurisdiction as occasion might arise, in suits of ejectment or otherwise, for the enforcement of such wills. In response to a general demand of the community for a change in this regard, the act of June 8, 1898, operated a radical alteration in the law. This act, among others, contained the following provisions, which are invoked as affecting the present controversy:

"SEC. 2. That, in addition to the jurisdiction conferred in the preceding section of this act, plenary jurisdiction is hereby given to the said court (the supreme court of the District), holding the said special term, to hear and determine all questions relating to the execution and to the validity of any and all wills devising any real estate within the District of Columbia, and of any and all wills and testaments properly presented for probate therein, and to admit the same to probate and record in said special term; and neither the execution nor the validity of any such will or testament so admitted to probate and record shall be impeached or examined collaterally, but the same shall be in all respects and as to all persons *res judicata*, subject, nevertheless, to the provisions hereinafter contained,

"SEC. 3. That all issues of fact hereafter arising in the supreme court of the District of Columbia holding a special term for orphans' court business, including those relating to the execution or the validity of any will or testament, shall hereafter be tried before said justice holding said special term, and when required for such purpose jurors shall be drawn in the manner now by law provided for the drawing of jurors for service at the special term of the supreme court of the District of Columbia sitting as a circuit court for said District.

"SEC. 4. That no will or testament shall be hereafter admitted to probate and record in the said District until the following procedure shall have been followed:

"Whenever any will or testament shall be presented for probate and record to the said justice, he shall direct all of the heirs-at-law or next of kin of the testator, or both, as the case may require, to be summoned to appear before him at a certain day, not earlier than ten days from the date of said presentation. If said summons shall be returned personally served upon all of said heirs-at-law or next of kin, or both, at least five days before said return day, then, if no caveat be filed to said will, the said justice may forthwith admit the same to probate and record. But if any of said

heirs-at-law or next of kin be returned 'not to be found,' then the said justice shall cause not less than thirty days' notice of the application for such probate to be published in some newspaper of general circulation in the District of Columbia, and may order such other publication as the case may require. And upon such notified day, or such subsequent day as the court shall appoint, the said application for probate shall be heard, due proof of such publication being made; and if no caveat be filed, the said will or testament shall be admitted to probate and record. In all cases in which all of the heirs-at-law or next of kin of a testator, or both, consent to such probate and record, such will and testament shall thereupon be forthwith admitted to probate and record without the
31 hereinbefore-described proceedings. In all cases in which any of said heirs-at-law or next of kin is an infant or of unsound mind, the said justice shall appoint a guardian *ad litem* for said infant or person of unsound mind: Provided, that in no case shall any will or testament be admitted to probate and record save upon formal proof of its proper execution.

"SEC. 6. That whenever any caveat shall be filed, issues shall be framed under the direction of the court for trial by jury: Provided, that in all cases in which all persons interested are *sui juris* and are before the court, the issues may be tried and determined by the court without a jury upon the written consent of all such parties. At least ten days prior to the time of trial all of the heirs-at-law or next of kin of the decedent, or both together, with all persons claiming under the will, shall be each served with a copy of said issues and a notification of the time and place of the trial thereof. * * * If, as to any party in interest, the notification shall be returned 'not to be found,' the court shall assign a new day for such trial, and shall order publication at least twice a week for a period of not less than four weeks of a copy of the issues and notification of trial in some newspaper of general circulation in the District of Columbia, and may order such other publication as the case may require. And the supreme court of the District of Columbia may from time to time prescribe and revise rules and regulations for service personally upon such party outside of the District of Columbia of a copy of such issues and notification, but personal service upon absent defendants shall in no case be essential to the jurisdiction of the court in the premises. Upon the day notified, or such subsequent day as the court shall appoint, the court shall proceed with the trial of said issues, due proof of such publication, and, when required, of such personal service being made, and due opportunity being given to any party in interest to demand other and further issues. On the trial of any such issue exceptions may be taken to the rulings of the court, which shall be embodied in a bill of exceptions, to be settled and signed by the justice presiding within such time as may be fixed by the rules of practice prescribed from time to time by the supreme court of the District of Columbia in general term, and the said justice shall have the same power to set aside the verdict and grant a new trial that is possessed and exercised by the supreme court of the District of Columbia in cases tried with a jury accord-

ing to the course of the common law, and as to such trials shall have all other powers now vested by law in the supreme court of the District of Columbia holding a special term as a circuit court. In all cases in which such issues shall be tried the verdict of the jury and the judgment of the court thereon shall, subject to proceeding in error and to such revision as the common law provides, be *res judicata* as to all persons, nor shall the validity of any such judgment be impeached or examined collaterally."

"SEC. 8. That the foregoing sections of this act shall apply only to wills and testaments hereafter offered for probate, and, in cases of intestacy, to the estates of such persons as shall die after the passage of this act: Provided, that in the supreme court of the District of Columbia holding a term for orphans' court business any person interested under any will heretofore filed in said court may offer the same for probate as a will of real estate, whereupon such proceedings shall be had as by this act are authorized in regard to wills hereafter offered for probate.

"SEC. 10. * * * That the provisions of this section shall not apply to any proceedings at law or in equity pending at the date of the passage of this act, or commenced within one year after the passage of this act, wherein or whereby the validity of such will or codicil is or shall be called in question."

With this act in force, the appellee, Charles R. Burr, on July 5, 1899, being the executor named in a paper-writing purporting to be the last will and testament of one Ezra W. Leach, filed a petition in the supreme court of the District holding a special term for orphans' court business, for the purpose of the probate of that will as a will of real estate, the same, it seems, having, previously to the passage of the act, been probated and admitted to record in that court, after contest by some of the next of kin, as a valid will of personalty. Notice of the application for the new probate was duly given in accordance with the provisions of the act of 1898 to the heirs-at-law of the deceased; and these appeared by attorney, and made answer to the petition. The substance of the answer was a denial of the testamentary capacity of the deceased, duress exercised over the testator by the beneficiary under the will, one Samuel H. Lucas, and an allegation that the testator did not at the time of the execution of the will own the property sought to be transmitted thereby, having previously, as it was alleged, made a deed of conveyance thereof, and that the alleged will was not the will of the deceased. And the answer was interposed as a caveat to the will.

Reply was made by the appellees to the caveat, alleging the validity of the will; and thereupon issues were framed by the court. These issues, three in number, were as follows: (1) Whether at the time of the execution of the alleged will, which was December 21, 1896, a few hours before the death of the testator, he was of sound mind, capable of executing a valid deed or contract; (2) whether the paper-writing in question had been procured from him by threats, menaces, or duress exercised over him by Lucas or any other person; and, (3) whether such paper-writing had been procured by fraud on the part of Lucas or any other person.

Soon afterwards a motion was made on behalf of the heirs-at-law to vacate the order approving these issues, on the ground, as alleged, that the act of Congress did not apply to wills offered for probate prior to the date of its passage; but it does not appear that any action of the court was taken, or sought to be taken, upon the motion. Then a motion was interposed on behalf of the same parties for the allowance of a further issue, whether the paper-writing in question was "a valid operative instrument." On this motion likewise the record before us shows no action taken. And why these motions should have been introduced into this record, where they are a mere incumbrance, is not apparent.

32 The issues were set for trial; but, on the motion of the attorney for the caveators, the time therefor was enlarged, and a new day was set for the purpose, with a proviso in the order, that, inasmuch as some of the heirs-at-law, who were named, had been returned "not to be found," the order and a copy of the issues should be published twice a week for four weeks in the Evening Star newspaper. The order was made on January 26, 1900; and the required publication was made on January 26; January 30, and February 2, 6, 9, 13, 16, and 20, 1900—the first advertisement being in the same week and on the same day on which the order was made, two advertisements in each one of the three following weeks, and the last one in the week thereafter.

The trial was finally had on March 5 and 6, 1900. At the beginning of it, the caveators, who had been served with process, or who had appeared in the cause, were by order of court made plaintiffs, and the executor Burr and Samuel H. Lucas were made defendants; and thus they went to trial. The only testimony offered was that adduced on behalf of the caveators. At its conclusion the counsel for the caveatees moved the court to instruct the jury to render a verdict in favor of the caveatees on all the issues, on the ground that the caveators had adduced no testimony which entitled them to go to the jury; and this motion the court allowed, and directed a verdict accordingly. Exception to this ruling was taken by the caveators. After motion for a new trial overruled, judgment was rendered upon the verdict, and the will was admitted to probate and record as a valid will of real estate. From this order the present appeal has been taken on behalf of the caveators.

Two briefs have been filed in this cause on behalf of the appellants, the first one by the attorney who conducted the cause in the court below and took the appeal, but who has been prevented from appearing in this court; and the second by other counsel. Some apparent confusion is introduced into the case by the fact that the assignments of error in these two briefs are different, the former containing sixteen, the latter only four assignments. But while the latter brief is designated as "supplemental," the four assignments contained in it sufficiently state all the questions in the case that can be regarded as substantial, and we may therefore disregard the assignments contained in the original brief.

The four assignments of error for our consideration are: 1st. That the court below was without authority or jurisdiction to admit

the will in question to probate, for the reason, as alleged, that the procedure prescribed by the act of Congress of 1898 had not been followed; 2d. That the publication against absent parties was not in accordance with the order of the court, or the provisions of the act; 3d. That it was error to direct the jury to render a verdict for the caveatees; 4th. That there was nothing upon which the alleged will could operate, inasmuch, as it is alleged, the testator had previously disposed of the same property by deed.

The first and second of these assignments may be considered together, since they have reference to the same subject-matter, that of the procedure prescribed by the act of Congress of 1898. And in this connection it may be stated that a large part of the argument of counsel on the point is, in our opinion, irrelevant, inasmuch as it is based on the theory that the record should show some things, which it is claimed that it does not show, when confessedly the whole record is not before us, but only certain specified parts of it, and in fact the original papers from the court below, not included in the transcript before us, have been produced in the argument of the cause to show that these very things had been done. The appellants have brought the record here; and, if they would show that jurisdiction was wanting in the court below, by reason of the absence of some essential part of the prescribed procedure, it was their duty to bring such a complete record here as would plainly show the fact.

The only question that is deserving of consideration in this connection is, whether, after the issues between the parties had been formulated under the order of the court, there was sufficient publication of that order and of the time assigned for the trial, in accordance with the requirements of the act of Congress; and this question is properly raised, since the record before us shows precisely what was done.

The order of the court, approving the issues and directing notice to absent parties by way of publication, was made on Friday, January 26, 1900. On the same day, in the afternoon, the advertisement was inserted in the Evening Star newspaper; and it was repeated on Tuesday and Friday of the following week, and on Tuesday and Friday of each of the two following weeks, and on Tuesday of the fourth week thereafter. The order required publication "twice a week for four weeks," and the act of Congress required publication "at least twice a week for a period of not less than four weeks." The question is, whether the publication actually made was in compliance with these requirements; and this again depends upon the question whether the act of Congress and the order of the court by the term week intended the conventional week of seven days, beginning on Sunday and ending on Saturday, or a period merely of seven consecutive days without reference to any special commencement or conclusion. If the latter was meant, then the publication in the present case was undoubtedly sufficient; but if the term was intended to be taken in the former sense, the publication was insufficient.

But we are of opinion that the word week in this act of Con-

gress was not intended to mean the conventional week beginning with Sunday and ending with Saturday, but a period of seven consecutive days. The word is used in both senses, but the primary sense is that of a period of seven consecutive days. So it is given by Webster's Dictionary, and by all the law dictionaries. Only in a secondary sense is the term applied to mean the specific period of time beginning with Sunday and ending with Saturday. Undoubtedly the generic and not the specific meaning is to be taken, unless the contrary is expressly stated, or necessarily implied in the context in which the word is used; and we find nothing in the act of Congress of 1898 to show that the conventional week was in-
33 tended. On the contrary, the plain import of that act is that the word is to be taken in its primary, and not in its conventional sense. For it requires the publication to be not for four weeks, or for any number of weeks, but for a period of time not less than four weeks. The period of time is to be measured by weeks, evidently without reference of any kind to the conventional week.

In support of their contention, however, the appellants cite the case of Ronkendorff *vs.* Taylor, 4 Pet. 349, 361. There the question was as to the legality and sufficiency of a notice given by a collector of taxes of an intended sale of property for non-payment of taxes. The law in force at the time required such notice to be given by advertisement in a newspaper once a week for three months. The collector gave the required notice for the specified length of time; but the advertisement, although inserted once in each conventional week, was not inserted always on the same day of the week, so that sometimes there was an interval of eleven days between the successive publications. In regard to this the court said:

"The words of the law are 'once a week.' Does this limit the publication to a particular day of the week? If the notice be published on Monday, is it fatal to omit the publication until the Tuesday week following? The object of the notice is as well answered by such a publication as if it had been made on the following Monday. A week is a definite period of time, commencing on Sunday and ending on Saturday. By this construction the notice in this case must be held sufficient. It was published Monday, January 6th, and omitted until Saturday, January the 18th, leaving an interval of eleven days; still the publication on Saturday was within the week succeeding the notice of the 6th. It would be a most rigid construction of the act of Congress, justified neither by its spirit nor by its language, to say that this notice must be published on any particular day of a week. If published once a week for three months, the law is complied with, and its object effectuated."

It is clear to us that the ruling of the court below in the present case is not antagonistic to what was said by the Supreme Court of the United States in the case cited. The question was not the same in that case as that now before us. It is very plain that, when that court said that "a week was a definite period of time commencing on Sunday and ending on Saturday," it did not mean that a week might not more generally be described as a period of seven consecutive days, without reference to any specific day of commence

ment. With regard to the case before that court, it was held that the one advertisement required might be made on any day of the conventional week. But if the question had been as to when the week should begin to be counted for the purpose of the determination of the entire period for which the advertisement should be inserted, certainly we are justified in assuming that it would hold, in accordance with the common understanding of the word, that a week might begin on any day for the purposes of the act.

We are of opinion, therefore, that the publication here had was duly made for the time prescribed by the act of Congress and the order of the court, and that there was no want of jurisdiction in the court by reason of any insufficient publication.

It is argued in the next place, that it was error on the part of the trial court to direct a verdict for the caveatees. The argument goes so far as to deny the right of that court to direct a verdict in any case or under any circumstances upon issues formulated under this act of Congress. But we know of no special sanctity that inheres in cases of this character to exclude the ordinary supervising power of the court and to conserve to the jury the arbitrament not only of questions of fact, but equally of questions of law, as this argument would require. On the contrary, the act of Congress itself specifically provides that the trial justice shall have "all the powers now vested by law in the supreme court of the District of Columbia holding a special term as a circuit court," including therein the power to settle bills of exceptions, to set aside verdicts, and to grant new trials, all the powers, in fact, which have been exercised in the courts of common law from time immemorial in the trial of issues transmitted to them from the orphans' court. The act of 1898 had two great purposes to subserve, the one to assimilate the probate of wills of real estate to the previously existing law which governed the matter of the probate of wills of personalty, and the other to authorize the trial of issues in the probate court itself, instead of having them transmitted to the common-law branch of the court for trial; and it certainly contemplated, and it made, no change in the previously existing and well-settled practice on the trial of issues.

The right of the trial court, therefore, to instruct the jury, and in proper cases to direct a verdict, cannot reasonably be controverted; and the only question open here is whether the present was a proper case in which to direct a verdict; that is, whether there was any sufficient testimony in this case upon any of the issues proper to be submitted to a jury. We are of opinion that the trial court ruled rightly that there was no such testimony. We have sought in vain through the testimony embodied in the bill of exceptions for even a scintilla of evidence proper to go to a jury. The only portion of the testimony seriously insisted on by the appellants in this connection is a part of the deposition of Rev. Hugh T. Stevenson, the pastor of the church of which the deceased testator was a member. This deposition was originally taken by the caveatees, and was intended to be used on their behalf; but the caveators offered a portion of it in evidence for themselves. The substance of this was

that the witness was the pastor of the church of which the testator was a member; that the testator had always been active in church matters, and was a member of the executive committee of the denomination to which he belonged; that he was a man of excellent ability and intelligence, and well competent to transact business up to the very end of his life; that the witness observed no change in his business capacity to the time of his death; that a few hours before the testator's death, the testator had sent for witness, and had stated to him that he had wanted to give the church a parsonage, but that it was too late now to do it, in view of the prohibitions of the
34 law; and that he now desired to execute some paper whereby his property would be vested in Samuel H. Lucas, who would give effect to his wishes in regard to the church; that this Samuel H. Lucas was a colored man whom the testator had taken into his service years before, and for whom, having no family of his own, he had taken a great fancy, and to whom, in fact, he had for a long time committed the management of his business; that, accordingly, in pursuance of the testator's directions, the witness had prepared a paper in the form of a deed, and had sent for a notary to come in and see to its execution; that the appellee Burr, who was a friend of the testator and who is named as executor in the will, had also been sent for; that, after the preparation of the deed, its signature by Leach, and acknowledgment by him, but before the notary had affixed any certificate to it, the witness expressed some doubt, in view of his ignorance of such matters, whether the paper was in proper form for the purpose, and he suggested to Leach that, in order to make things sure, he might make a will; that accordingly the testator directed the notary to draw up a will, and the notary drew up the will in question, which was duly executed by the testator; and that Samuel H. Lucas had no part whatever in the procurement of the will. It also appears that the deed prepared by Mr. Stevenson had never been completed by the attachment of the official certificate of the notary and had never been delivered.

Upon this testimony it was argued that a jury might fairly have inferred the exercise of undue influence by Stevenson on the testator. But we fail to find any justification for such an inference. Even assuming that the opportunity for such influence was present, and that the relations between the testator and Stevenson were such as to throw upon the caveatees the burden of proving that no such undue influence was exercised, as to which under the circumstances there is reason to doubt, yet the fact is that the testimony of Stevenson fully and fairly sustains that burden. He became the witness of the caveators; they introduced his deposition in evidence, and thereby they vouched for his integrity and truthfulness. He tells a straightforward story, in itself not unreasonable; and so far as it is possible to prove a negative, his statement completely disproves the exercise of any undue influence by him upon the testator. The utmost that could be said of the transaction in this regard is, that the opportunity was present for the exercise of such influence, and that being a minister of the Gospel he might justly be suspected of doing what ministers of the Gospel have often done under similar

circumstances. But suspicion is not proof, and proof is required to sustain the charge of fraud, as well as every other fact alleged and required to be sustained by him who alleges it. The statement of the transaction as given by Stevenson, a statement for which the caveators have vouched by giving it in evidence, contains not one scintilla of evidence that he exercised any influence whatever over the testator. On the contrary, it is decisive to the effect that the scheme of the will emanated solely and exclusively from the testator himself.

The last contention on behalf of the appellants is that the will in question was inoperative, because the testator, as it is alleged, had already conveyed the same property by deed which he attempted to convey by the will. But plainly this contention is untenable. It is very clear from the testimony that the alleged deed was never completed, and lacked the essential element of delivery. Moreover, it is not quite apparent from the record before us what property, if any, the deed purported to convey, or whether it was drawn in a manner to convey any property. It is not contained in this record; and it does not appear from the record that it was ever offered in evidence in the case. And yet it seems to have been accessible to the appellants; and if it was important for their contention in the cause to have it introduced in evidence, they could have compelled its production. The fact that they did not do so is evidence that it would not have greatly served their purpose. And even if the fact be that it was actually introduced in evidence, we have no means of determining its contents, since, as we have stated, it is not contained in the record before us, and there is nothing in the record to show either its contents or its operative character. We are not justified, therefore, in assuming that the deed, even if we could suppose it to have been completed and to have been actually delivered to the grantee, conveyed the same property upon which the will was intended to operate.

Moreover, if the deed in question was valid to convey the testator's property to the grantee named in it, it is not apparent how the appellants can be prejudiced by the admission of the will to probate. For, since the grantee in the deed and the donee under the will are one and the same person, if the grantee has already good title under the deed, as against the appellants, certainly the appellants cannot be injured by such confirmation, if any, as the will may give to the previous grant. The fact that, by the act of Congress, the adjudication on the will in the present proceeding is made a finality as to the validity of the will, cannot have the effect of substituting that will for the prior deed, if that prior deed was a valid operative instrument; and if it was not a valid operative instrument, of course, the contention of the appellants wholly fails.

We find no error in the record; and the order and judgment appealed from must therefore be affirmed, with costs. And it is so ordered.

35 TUESDAY, *November 6th, A. D.* 1900.

GUSTAVUS LEACH, WILLIAM F. LEACH, CHESTER H. Shaw, George L. Shaw, Howland L. Hunt, Francis H. Hunt, Alice O. McNeil, William W. Hunt, Emma G. McNeil, Edward E. Hunt, Judson Hunt, Howland N. Hunt, Arthur A. Hunt, Cyrus P. Reed, and Gustavus L. Reed, Appellants,

vs.

CHARLES R. BURR, Executor, and SAMUEL H. Lucas.

No. 997, October Term, 1900.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the order and judgment of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE MORRIS.

November 6, 1900.

36 THURSDAY, *November 15th, A. D.* 1900.

GUSTAVUS LEACH, WILLIAM L. LEACH, CHESTER H. SHAW, George L. Shaw, Howland L. Hunt, Francis H. Hunt, Alice O. McNeil, William W. Hunt, Emma G. McNeil, Edward E. Hunt, Judson Hunt, Howland N. Hunt, Arthur A. Hunt, Cyrus P. Reed, and Gustavus L. Reed, Appellants,

vs.

CHARLES R. BURR, Executor, and SAMUEL H. LUCAS.

No. 997.

On motion of Mr. W. D. Davidge, Jr., attorney for the appellants in the above-entitled cause, it is ordered by the court that a writ of error to remove said cause to the Supreme Court of the United States be, and the same is hereby, allowed on giving bond in the sum of three hundred dollars.

37 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Gustavus Leach, William F. Leach, Chester H. Shaw, George L. Shaw, Howland L. Hunt, Francis H. Hunt, Alice O. McNeil, William W. Hunt, Emma G. McNeil, Edward E. Hunt, Judson Hunt, Howland N. Hunt, Arthur A. Hunt, Cyrus P. Reed, and Gustavus L. Reed, appellants and Charles R. Burr, executor and Samuel H. Lucas, appellees a manifest error

hath happened, to the great damage of the said appellants as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Seal Court of Appeals, District of Columbia.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 15th day of November, in the year of our Lord one thousand nine hundred.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

38 FRIDAY, *January 11th, A. D.* 1901.

GUSTAVUS LEACH, WILLIAM F. LEACH, CHESTER H. SHAW, George L. Shaw, Howland L. Hunt, Francis H. Hunt, Alice O. McNeil, William W. Hunt, Emma G. McNeil, Edward E. Hunt, Judson Hunt, Howland L. Hunt, Arthur A. Hunt, Cyrus P. Reed, and Gustavus L. Reed, Appellants,

vs.

CHARLES R. BURR, Executor, and SAMUEL H. LUCAS.

No. 997.

The motion to approve the bond on writ of error to the Supreme Court of the United States was submitted to the consideration of the court by Mr. W. D. Davidge Jr., in support of motion and by Mr. J. J. Darlington in opposition thereto: Whereupon it is ordered that said motion be, and the same is hereby, overruled.

39 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the justices of the supreme court of the District of Columbia, Greeting:

[Seal Court of Appeals, D. C.]

Whereas, lately in the supreme court of the District of Columbia, before you or some of you, in a cause entitled *In re* estate of Ezra W. Leach, No. 7571, probate, wherein the order of the said supreme court entered in said cause on the 17th day of March, A. D. 1900, is in the following words, viz:

"*In re* Estate of EZRA W. LEACH. No. 7571.

Order.

The issues certified to the supreme court for trial by jury under an order passed herein on the 1st day of June, 1899, under the caveat to the will of Ezra W. Leach, filed by Cyrus P. Reed, Gustavus L. Reed, Gustavus Leach, William F. Leach, Chester H. Shaw, George L. Shaw, Howland L. Hunt, Francis H. Hunt, Alice O. McNeil, Emma G. McNeil, William W. Hunt, Edward E. Hunt, Judson Hunt, Howland A. Hunt, and Arthur E. Hunt, having been found in favor of the said will, as appears to the satisfaction of the court by the answers of the jurors to the said issues, certified by the clerk, and filed herein, it is by the court, this 17th day of March, A. D. 1900, adjudged, ordered, and decreed that the paper-writing bearing date the 21st day of December, 1896, purporting to be the last will and testament of Ezra W. Leach, be, and the same hereby is, admitted to probate and record, and that letters testamentary upon the estate of the said decedent do issue to Charles R. Burr, the executor therein named, upon his giving bond in the penalty of five hundred dollars, conditioned for the faithful performance of his trust; and it is further adjudged, ordered, and decreed that the said Charles R. Burr, the executor, as aforesaid, do recover against the said caveators the costs incurred under their said caveat; which costs are hereby taxed at the sum of $49.10 *dollars*, and that they have execution therefor as at law.

And the said paper-writing bearing date the said 21st day of December, 1896, having been further offered as a will of real estate, as provided by law, and it appearing to the satisfaction of the court that the issues framed upon the caveat filed against the admission of the said paper-writing for probate and record as prayed have been determined in favor of the said will at the trial thereof before a jury, after due proof of the notice of publication required by the order of the court, and no other further issues having been demanded by any party in interest, after due opportunity afforded therefor, and the motion of the caveator for a new trial having been heard and overruled, it is by the court, this 17th day of March, A. D. 1900, further adjudged, ordered, and decreed that the said paper-writing be, and the same hereby is, admitted to probate and record as the valid last will and testament of the said Ezra W. Leach, duly executed to pass real estate of the said testator within said District; and it is further adjudged, ordered, and decreed that the said Charles R. Burr, executor, as aforesaid, do recover against the said caveators the cost of the proceedings to determine the validity of the said will as a will of real estate, which *are* hereby taxed at the sum of $128.24 *dollars*, and that he have execution therefor as at law.

CHAS. C. COLE, *J.*"

40 as by the inspection of the transcript of the record of the said supreme court, which was brought into the Court of Appeals of the District of Columbia by virtue of an appeal, taken by Gustavus

Leach, William F. Leach, Chester H. Shaw, George L. Shaw, Howland L. Hunt, Francis H. Hunt, Alice O. McNeil, William W. Hunt, Emma G. McNeil, Edward E. Hunt, Judson Hunt, Howland N. Hunt, Arthur A. Hunt, Cyrus P. Reed and Gustavus L. Reed, whereon Charles R. Burr executor, and Samuel H. Lucas, were made the parties appellee, agreeably to the act of Congress in such case made and provided, fully and at large appears.

41 And whereas, in the term of October, in the year of our Lord one thousand nine hundred, the said cause came on to be heard before the said Court of Appeals on the said transcript of record, and was argued by counsel:

On consideration whereof it is now here ordered and adjudged by this court that the order and judgment of the said supreme court in this cause be, and the same is hereby, affirmed with costs; and that the said Charles R. Burr, executor, and Samuel H. Lucas recover against the said Gustavus Leach *et al.* for their costs herein expended and have execution therefor.

NOVEMBER 6, 1900.

42 You therefore are hereby commanded that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Richard H. Alvey, Chief Justice of said Court of Appeals, the 11th day of January, in the year of our Lord one thousand nine hundred and one.

Costs of Chas. R. Burr, Ex'r, et al.

Clerk..... $
Printing record.....

$

Paid by Leach *et al.*

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

[Endorsed:] Court of Appeals of the District of Columbia. No. 997, Octo. term, 1900. Gustavus Leach *et al.*, appellants, *vs.* Charles R. Burr, exec'r, *et al.* Mandate.

43 In the Court of Appeals of the District of Columbia.

GUSTAVUS LEACH, WILLIAM F. LEACH, CHESTER H. SHAW, George L. Shaw, Howland L. Hunt, Francis H. Hunt, Alice O. McNeil, William W. Hunt, Emma G. McNeil, Edward E. Hunt, Judson Hunt, Howland N. Hunt, Arthur A. Hunt, Cyrus P. Reed, and Gustavus L. Reed, Appellants,

vs.

CHARLES R. BURR, Executor, and SAMUEL H. LUCAS.

No. 997.

To the honorable the Chief Justice and associate justices of the Supreme Court of the United States:

Now come Gustavus Leach, William F. Leach, Chester H. Shaw, George L. Shaw, Howland L. Hunt, Francis H. Hunt, Alice O. McNeil, William W. Hunt, Emma G. McNeil, Edward E. Hunt, Judson Hunt, Howland N. Hunt, Arthur A. Hunt, Cyrus P. Reed, and Gustavus L. Reed, the appellants in the cause above entitled and say that heretofore to wit, on the 6th day of November, 1900, in the Court of Appeals of the District of Columbia wherein the said cause was then depending and in which they were the parties appellant and Charles R. Burr, executor and Samuel H. Lucas were the parties respondent, judgment in said cause was entered by the said court in favor of the said respondents and against these appellants by which judgment these appellants were and are aggrieved in that in said judgment and the proceedings had prior thereto in said cause wherein the matter in dispute exceeds the sum or value of five thousand dollars certain errors were committed to the prejudice of these appellants for which they make assignment of error as follows, viz:

1. Said Court of Appeals erred in sustaining the rulings of the court below and each and every of them severally.

2. Said Court of Appeals erred in its decision that the court
44 below had acquired jurisdiction of each and every the non-resident parties to said cause by due publication.

3. Said Court of Appeals erred in sustaining the court below in taking the cause away from the jury and in directing such jury what verdict they should find and what answers make to the several issues joined.

Wherefore these appellants pray that a writ of error may issue to the said Court of Appeals for the District of Columbia for the correction of the errors complained of, and that a duly authenticated transcript of the record, proceedings and papers herein may be sent to the Supreme Court of the United States to the end that such errors may be corrected as of right and according to the laws and customs of the United States should be done.

W. D. DAVIDGE,
WILLIAM A. MELOY,
Att'ys for App'lts.

(Endorsed:) Gustavus Leach *et al.* pl'ffs in error, *vs.* Charles R. Burr, *et al.*, def'ts in error. Washington May 29, 1901. Let the writ of error issue as prayed, on pl'ffs in error filing bond in the penal sum of three hundred dollars, conditioned according to law, & approved by the undersigned Melville W. Fuller, Chief Justice of the United States. Court of Appeals, District of Columbia. Filed Jun- 1 1901. Robert Willett, clerk.

45 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals of the District of Columbia, before you, or some of you, between Gustavus Leach; William F. Leach; Chester H. Shaw; George L. Shaw; Howland L. Hunt; Francis H. Hunt; Alice O. McNeil; William W. Hunt; Emma G. McNeil; Edward E. Hunt; Judson Hunt; Howland N. Hunt; Arthur A. Hunt; Cyrus P. Reed; Gustavus L. Reed, appellants, and Charles R. Burr, executor; and Samuel H. Lucas, appellees, a manifest error hath happened, to the great damage of the said Gustavus Leach; William F. Leach; Chester H. Shaw; George L. Shaw; Howland L. Hunt; Francis H. Hunt; Alice O. McNeil; William W. Hunt; Emma G. McNeil; Edward E. Hunt; Judson Hunt; Howland N. Hunt; Arthur A. Hunt; Cyrus P. Reed and Gustavus L. Reed, appellants, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 31st day of May, in the year of our Lord one thousand nine hundred and one.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
MELVILLE W. FULLER,
Chief Justice of the United States.

[Endorsed:] Gustavus Leach *et al.* pl'ffs in error *vs.* Charles R. Burr *et al.* def'ts in error. Writ of error. Court of Appeals, District of Columbia. Filed Jun- 1, 1901. Robert Willett, clerk.

46 Know all men by these presents that we, Tracy L. Jeffords and John H. Adriaans, as principals, and William Anderson, as surety, are held and firmly bound unto Charles R. Burr, executor, and Samuel H. Lucas in the full and just sum of three hundred (300) dollars, to be paid to the said Charles R. Burr, executor, and Samuel H. Lucas, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twentieth day of May, in the year of our Lord one thousand nine hundred and one (1901).

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said court, between Gustavus Leach; William F. Leach; Chester H. Shaw; George L. Shaw; Howland L. Hunt; Francis H. Hunt; Alice O. McNeil; William W. Hunt; Emma G. McNeil; Edward E. Hunt; Judson Hunt; Howland N. Hunt; Arthur A. Hunt; Cyrus P. Reed; Gustavus L. Reed, appellants; and Charles R. Burr, executor, and Samuel H. Lucas, appellees a judgment was rendered against the said appellants and the said appellants having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said appellees citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington within 30 days from the date thereof,

Now, the condition of the above obligation is such, that if the said appellants Gustavus Leach; William F. Leach; Chester H. Shaw; George L. Shaw; Howland L. Hunt; Francis H. Hunt; Alice O. McNeil; William W. Hunt; Emma G. McNeil; Edward E. Hunt; Judson Hunt; Howland N. Hunt; Arthur A. Hunt; Cyrus P. Reed Gustavus L. Reed shall prosecute their said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

TRACY L. JEFFORDS. [SEAL.]
JOHN H. ADRIAANS. [SEAL.]
his
WILLIAM x ANDERSON. [SEAL.]
mark.

Sealed and delivered in the presence of—
As to mark of William Anderson:
BOYD WATSON.
LOUIS B. TETENS.

Approved by—
MELVILLE W. FULLER,
Chief Justice of the United States.

[Endorsed:] No. 997. Gustavus Leach *et al.* appellants *vs.* Charles R. Burr, exec'r, *et al.* Bond on writ of error to Supreme Court U. S. Court of Appeals District of Columbia. Filed June 1, 1901. Robert Willett, clerk.

47 UNITED STATES OF AMERICA, *ss*:

To Charles R. Burr, executor, and Samuel H. Lucas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia wherein Gustavus Leach, William F. Leach, Chester H. Shaw, George L. Shaw, Howland L. Hunt, Francis H. Hunt, Alice O. McNeil, William W. Hunt, Emma G. McNeil, Edward E. Hunt, Judson Hunt, Howland N. Hunt, Arthur A. Hunt, Cyrus P. Reed, and Gustavus L. Reed are the plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 29th day of May, in the year of our Lord one thousand nine hundred and one.

MELVILLE W. FULLER,
Chief Justice of the United States.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun 8, 1901. Robert Willett, clerk.

On this 8th day of June, in the year of our Lord one thousand nine hundred and one, personally appeared before me, the subscriber, Henry M. Dexter, and makes oath that he delivered a true copy of the within citation to Joseph J. Darlington, attorney for appellees on the 8th day of June, 1901; and to the appellees Charles R. Burr, executor, and Samuel H. Lucas personally on the 7th day of June, 1901.

HENRY M. DEXTER.

Sworn to and subscribed the 8th day of June, A. D. 1901.
ROBERT WILLETT, *Clerk*,
By H. W. HODGES, *Ass't Clerk*.

48 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 47, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Gustavus Leach, William F. Leach, Chester H. Shaw, George L. Shaw, Howland L. Hunt, Francis H. Hunt, Alice O. McNeil, William W. Hunt, Emma G. McNeil, Edward E. Hunt, Judson Hunt, Howland N. Hunt, Arthur A. Hunt, Cyrus P. Reed, and Gustavus L. Reed, appellants, *vs.* Charles R. Burr, executor, and Samuel H. Lucas, No. 997, April term, 1901, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 18th day of June, A. D. 1901.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 18238. District of Columbia Court of Appeals. Term No. 385. Gustavus Leach, William F. Leach, Chester H. Shaw, *et al.*, plaintiffs in error, *vs.* Charles R. Burr, executor, and Samuel H. Lucas. Filed July 26, 1901.

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FILE COPY

Office Supreme Court U. S.
FILED
DEC 19 1902
JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States

GUSTAVUS LEACH ET AL.,
Plaintiffs in Error,
vs.
CHARLES R. BURR,
Receiver, and
SAMUEL H. LOCKE,
Defendants in Error.

No. 13,266.
Cal. Oct. Term, 1901,
No. 355.
Oct. Oct. Term, 1902,
No. 140.

Motion to Add Parties, and Brief in Support Thereof.

WILLIAM A. MELOY,
Attorney for Plaintiffs in Error.

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Supreme Court of the United States.

GUSTAVUS LEACH ET AL., *Plaintiffs in Error,*	
vs.	No. 18,238. Cal. Oct. Term, 1901, No. 385.
CHARLES R. BURR, *Executor, and* SAMUEL H. LUCAS, *Defendants in Error.*	Cal. Oct. Term, 1902, No. 145.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The plaintiffs in error in this cause respectfully represent and suggest as follows, to wit:

The record herein shows that among the issues herein involved are the questions of the due execution and validity of the last will and testament of one Ezra W. Leach, now deceased, of whom they are the next of kin and heirs at law, and whether the same, as to a portion of his property, was not intended and contrived to evade the law relating to devises for charitable uses, as contained in Section 1635 of the Code for the District of Columbia, forbidding the devise of real estate for church and religious purposes within thirty days before the death of the devisor.

At or immediately before the devisor's death he was seized and possessed of the following real property in the District of Columbia :

1st. All of lot one hundred and thirty (130), in Uniontown (now Anacostia), fronting twenty-eight (28) feet on the south side of Fillmore Street, near its intersection with Pleasant Street, by a uniform depth of one hundred and eleven (111) feet, which lot is improved ;

2nd. The north eight front of lot one hundred and thirty-one (131), adjacent to parcel one (1), having the same depth ;

3rd. All of lot four hundred and twenty-three (423), in Uniontown, fronting twenty-four feet on the east side of Jefferson Street, near its intersection with Pierce Street, with a uniform depth of one hundred and thirty (130) feet, which lot is improved ;

4th. The east one-half of lot four hundred and twenty-four (424), adjacent to parcel eight (3), fronting twelve feet on the east side of Jefferson Street, by the same depth ;

5th. All of lot six (6), in section nine (9), of the subdivision known as Barry Farm, fronting one hundred and sixty-five (165) feet on the north side of Howard Avenue, near its intersection with Nichols Avenue, by a uniform depth of two hundred and sixty-four (264) feet ;

6th. The east twenty-five (25) feet front of lot numbered seven (7), adjacent to parcel five (5), by the same depth.

An examination of the Land Records of said District, as the same are recorded in the office of the Recorder of Deeds for said District, show that since, and notwithstanding the pendency of these proceed-

ings, instruments of conveyance of the premises aforesaid have been executed by the defendant-in-error, Samuel H. Lucas, purporting to be the devisee under the will so questioned, and placed upon the records in the office of said recorder, as follows, viz:

1st. The first conveyance is a deed in fee, dated on the 20th day of February, 1901, acknowledged on the following day before William E. Jordan, a Notary Public in said District, and recorded on the 25th day of March, 1901, in Liber 2559, folio 124 et seq., signed by Samuel H. Lucas and Virginia Lucas, his wife, and purporting to convey to the Anacostia Baptist Church, a body corporate, duly incorporated under the general incorporation laws in force in said District, the land described in parcels 1 and 2 above mentioned.

2nd. The second conveyance is a deed of trust, dated and acknowledged on the 14th day of March, 1901, and recorded on the 10th day of April, 1901, in Liber 2533, folio 438 et seq., signed by Samuel H. Lucas et ux., and purporting to convey to Samuel H. Walker and Michael I. Weller, trustees of the Eastern Building and Loan Association of Washington, D. C., parcels three (3) and four (4) above mentioned, in trust, to secure an indebtedness stated by said Lucas to be due by him to John E. Herrell, treasurer of said Association, in the sum of eleven hundred ($1,100) dollars.

3rd. The third conveyance is a deed of trust, dated and acknowledged on the 8th day of April, 1901, and recorded on the 10th day of April, 1901, in Liber 2533, folio 441 et seq., signed by Samuel H. Lucas et ux., and purporting to convey to Samuel H. Walker and Michael I. Weller, trustees of the Eastern Building and Loan Association of Washington, D. C.,

portions of parcels five (5) and six (6) above mentioned, in trust, to secure an indebtedness stated by said Lucas to be due to John E. Herrell, treasurer of said association, in the sum of five hundred ($500) dollars.

4th. The fourth conveyance is a deed in fee, dated on the 23rd day of April, 1901, acknowledged on the 30th day of April, 1901, and recorded on the 8th day of May, 1901, in Liber 2570, folio 88 et seq., signed by Samuel H. Lucas et ux., and purporting to convey to Charles W. Harleston parcels three (3) and four (4), above recited.

5th. The fifth conveyance is a deed of trust, dated the 23rd day of April, 1901, acknowledged the 30th day of April, 1901, and recorded the 8th day of May, 1901, in Liber 2570, folio 91 et seq., signed by Charles W. Harleston et ux. Ellen, and purporting to convey to Henry K. Simpson and John McKee, trustees, the property described in the fourth conveyance, in trust, to secure a debt due by Charles W. Harleston to Samuel H. Lucas of four hundred ($400) dollars

6th. The sixth conveyance is a deed of trust, dated on the 29th day of April, 1901, acknowledged on the following day, and recorded on the 2nd day of May, 1901, in Liber 2557, folio 323 et seq., signed by Samuel Lucas et ux., and purporting to convey to Samuel H. Walker and Michael I. Weller, trustees of the Eastern Building and Loan Association of Washington, D. C., all of parcel six (6) above recited, in trust, to secure an indebtedness stated to be due by Samuel H. Lucas to John E. Herrell, treasurer of said association, in the sum of thirteen hundred ($1,300) dollars.

7th. The seventh conveyance is dated and acknowledged on the 12th day of August, 1901, and recorded on the following day in Liber 2582, folio 215 et seq.,

signed by Samuel H. Lucas et ux., and purporting to convey to Samuel H. Walker and Michael I. Weller, trustees of the Eastern Building and Loan Association of Washington, D. C., a portion of parcel five (5) above described—not included in the third conveyance—in trust to secure an indebtedness stated by said Lucas to be due by him to John E. Herrell, treasurer of said association, in the sum of two thousand ($2,000) dollars.

8th. The eighth conveyance is dated on the 31st day of October, 1901, and recorded on the 16th day of November, 1901, in Liber 2590, folio 432 et seq., signed by Samuel H. Lucas et ux., and purporting to convey to W. Cleary Sullivan all of parcel six (6) above recited—not included in the third and seventh conveyances—in trust to secure Rudolph B. Behrend the sum of fifteen hundred ($1,500) dollars.

Wherefore, inasmuch as the several grantees and beneficiaries aforesaid, by acceptance and the recording of said deeds have become parties in interest in the proceedings on this writ of error, and in the final determination thereof by this court, it is hereby suggested and moved by the plaintiffs in error that by due order and citation they, the said The Anacostia Baptist Church, a corporation organized under the laws of the District of Columbia; Samuel H. Walker, trustee; Michael I. Weller, trustee; The Eastern Building and Loan Association; Charles W. Harleston; Henry K. Simpson, trustee; John McKee, trustee; W. Cleary Sullivan, trustee; and Rudolph B. Behrend be made parties respondent in this cause, and brought into this court to abide its final order and judgment herein.

WILLIAM A. MELOY,
Attorney for Plaintiffs-in-Error.

DISTRICT OF COLUMBIA, } *ss:*

John H. Adriaans, being duly sworn, deposes and says that he is a member of the bar of the Supreme Court of the District of Columbia, and as such has examined many titles among the land records of the District of Columbia and elsewhere; that he has personally examined the records of conveyances mentioned in the foregoing suggestion and motion, and that the several records named therein, and the facts stated in said motion with respect thereto, and the recording thereof, are true.

JOHN H. ADRIAANS.

Sworn to and subscribed before me, this 8th day of December, A. D. 1902.

J. R. YOUNG, *Clerk*,
By M. A. CLANCY, *Asst. Clerk.*

Brief in Support of Motion to Add Parties.

The change of title to the real estate involved in these proceedings, *pendente lite*, vesting interests therein in the parties named, fully justifies the motion herewith filed, in analogy to the following cases:

"In an action to try title to a mining claim where the defendant sells his interest in the claim to a third person pending suit, the vendee may be substituted as defendant in place of the vendor."

Jordan v. Duke (1898), 53 Pac. Rep., 197.

"When land is conveyed by defendant in ejectment, *pendente lite*, the grantees are entitled to be substituted, and a default against their grantor will be set aside on their motion."

Plummer v. Brown, 64 Cal., 429.

"Where, pending action to recover land, a mortgagee has acquired the defendant's interest in the land, he may be substituted as defendant."

McKinnis v. Mortgage Co., 55 Kans., 259.

"When the receiver of an insolvent National Bank has been displaced by an 'agent' appointed under the acts of Congress in that behalf, it is proper practice to substitute, upon motion, the 'agent' as the plaintiff on the record in place of the 'receiver' in a suit already commenced by the latter."

McConville v. Gilmour (1888), 36 Fed. Rep., 277.

"In an action commenced by a State treasurer to recover money deposited in a bank under a statute authorizing such deposits, the State, which is the real party in interest, may properly be substituted as plaintiff by amendment, as such substitution makes no change in the cause of action."

Nebraska v. Hayden (1898), 89 Fed. R., 46.

"In a suit by a bondholder * * * substitution as complainants of the trustees in the mortgages securing the bonds does not change the cause of action, and is permissible."

Benson v. San Diego (1900), 100 Fed. Rep., 158.

"An assignment of a claim pending suit thereon, calls for no alteration or amendment in the complaint, but only for an application for a change of parties. If granted, the name of the party substituted should appear in the judgment file."

Fish v. Smith (1900), 73 Conn., 377.

"A party bidding at a foreclosure sale makes himself thereby a party to the proceedings and subject to the jurisdiction of the court for all orders necessary to compel the perfection of his purchase."

Blossom v. R. R., 1 Wall., 655;
Williams v. Morgan, 111 U. S., 684;
Kneeland v. Loan Co., 136 U. S., 89, 95.

"Where an appellant in this court becomes bankrupt, after his appeal taken, his assignee in bankruptcy, upon the production of the deed of assignment of the register in bankruptcy, duly certified by the clerk of the proper court, may, on motion, be substituted as appellant in the case."

Herndon v. Howard, 9 Wall., 665;
Gates v. Goodloe, 101 U. S., 613.

"The decree below, dismissing the bill, was entered after a new receiver had been appointed. An appeal to this court was taken in the name of the old receiver as the complainant, the new receiver becoming a surety in the appeal bond. In this court the new receiver was, on his own motion, substituted as the complainant and appellant, without prejudice to the proceedings already had; and the motion of the appellees to dismiss the appeal was denied."

Bowden v. Johnson, 107 U. S., 251.

WILLIAM A. MELOY,
Attorney for Plaintiffs in Error.

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JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

GUSTAVUS LEACH ET AL.,
Plaintiffs in Error,

vs.

CHARLES R. BURR,
Executor, and
SAMUEL H. LUCAS,
Defendants in Error.

Cal. Oct. Term, 1902,
No. 145.
No. 18,238.

BRIEF FOR PLAINTIFFS IN ERROR.

GEORGE F. HOAR,
WILLIAM A. MELOY,
Counsel for Plaintiffs in Error.

Supreme Court of the United States.

GUSTAVUS LEACH ET AL., *Plaintiffs in Error,*	
vs.	Cal. Oct. Term, 1902, No. 145.
CHARLES R. BURR, *Executor, and* SAMUEL H. LUCAS, *Defendants in Error.*	No. 18,238.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement of the Case.

This case arose in and was originally tried before a jury in the Supreme Court of the District of Columbia in Special Term for Orphans' Court business, thence carried by appeal to the Court of Appeals of the District of Columbia, and now comes here on writ of error.

Ezra W. Leach, white, died in the District of Columbia December 21, 1896, a bachelor, leaving as his only heirs at law the children and grandchildren of his deceased uncle and his deceased aunt, the plaintiffs in error.

Decedent's age was seventy-three (73) years, the duration of his last illness was eight (8) days, and the proximate cause of his death was "bronchial pneumonia" in acute form.

Decedent had personal and real property in the District of Columbia, but the value of the personalty was inconsiderable.

Being of charitable disposition, he one day supplied a small colored boy, whom he had not theretofore known, and of whose parentage he was equally ignorant, with food. Subsequently, ascertaining that the boy's parents were unable to provide for him properly, and as he was living alone, he offered the boy a home if he would work for him in managing his greenhouses. This boy was Samuel H. Lucas, the defendant in error. Leach and Lucas thereafter lived together in the former's house until the death of Leach.

On the 30th day of December, 1896, a paper-writing was filed in the Supreme Court of the District of Columbia, holding a Special Term for Orphans' Court business, in cause numbered 7,571, purporting to be the will of said decedent, which is set out in the record (p. 20), executed about two hours before decedent's death. But on the same day, immediately before executing said will, decedent signed, sealed, acknowledged and delivered a deed, granting *in praesenti* to the same Samuel H. Lucas the same real estate referred to in the alleged will. This deed was prepared by Rev. Hugh T. Stevenson, pastor of the Anacostia Baptist Church, (who was also a witness to the alleged will) and acknowledged and delivered by the decedent in the presence of two attesting witnesses before Andrew M. Green, a duly qualified Notary Public, who stated that he

would complete the jurat and affix his seal when he returned to his office.

To remedy any possible defects in the deed, said Stevenson suggested to Green that a will might also be drawn, as a supplement thereto. Green then prepared the alleged will which is in issue in this proceeding. The deed has been left unrecorded and has come into possession of the defendant in error, Burr, (Rec., pp. 21-24.)

On the 5th day of July, 1899, the proponents of the will filed a petition in the Orphans' Court of said District praying its admission to probate as to the realty, as they were permitted to do by Section 8 of the Act of June 8, 1898, (now section 141 of the Code), enlarging the jurisdiction of said Orphans' Court. A caveat was filed on the 30th day of August, 1899, on behalf of some of the heirs at law (Rec., p. 2.) An answer to this caveat (Rec., p. 3,) was filed on the 10th day of October, 1899, and three issues (Rec., p. 4,) were framed on the 3rd day of November, 1899, presenting questions of capacity, duress, and fraud respectively.

In pursuance of Section 6 of the above-recited Act, (now section 140 of the Code), the Orphans' Court passed an order (Rec. p. 7,) on the 26th day of January, 1900, directing publication of said issues and of the notice of trial, so as to reach non-resident heirs of decedent who did not sign the caveat. The affidavit showing the character of publication had, under said order, appears (Rec., p. 9.)

On the 5th day of March, 1900, a jury was sworn to try said issues, and by an order of Court (Rec. p. 10) the caveators were made plaintiffs upon the record and the caveatees were made defendants, and those published against were not made parties at all. No

proof of the execution of the will was offered at this trial. (See proviso to Section 4 of above Act, now Section 135 of the Code.)

After evidence adduced by plaintiffs, set out in the bill of exceptions (Rec., p. 14-25,) the Court, upon motion of the defendants, at the conclusion of of plaintiffs' testimony in chief, directed the jury to answer the first issue affirmatively and the second and third issues negatively; and such a verdict was accordingly found and entered (Rec., p. 11,) and judgment entered thereon (Rec. p. 12), and the will ordered admitted to probate and record (p. 13.) Exceptions to such ruling being noted, a bill of exceptions was signed and sealed by the presiding Justice, and an appeal prosecuted to the Court of Appeals of said District, which, however, affirmed the action of the trial Court (28 W. L. R., 782; also Rec., pp. 28-37.) From the decision of the Court of Appeals the present writ of error was allowed and prosecuted.

Assignment of Errors.

First. The Orphans' Court of the District of Columbia erred in assuming jurisdiction to admit to probate the paper-writing offered as a last will and testament of the decedent, and its decree is a nullity because the procedure required by Section 4 of the Act of June 8, 1898, was not followed. The Court had not authority or jurisdiction to make the decree.

Second. The publication, without which having been strictly made the Court could not acquire jurisdiction of the absent parties, was not made according to law, nor as required by the order of the Court,

and therefore the Court had not jurisdiction of the necessary parties, nor had they a day in Court.

Third. The trial court erred in taking the case from the jury and directing their verdict, and the appellate court erred in sustaining the action of the said court below.

It was error, because——

1st. There was evidence tending to show want of testamentary capacity in the alleged testator;

2nd. There was no "formal proof," in the language of the statute, of the "proper execution" of the alleged will (v. Sec. 4). The evidence of subscribing witnesses was not adduced to show its execution according to the forms of law, or that the alleged testator saw or might have seen such witness sign ;

3rd. The evidence tended to show that it was not the intention of decedent to devise his real estate to Lucas, as stated;

4th. And because the evidence tended to show that the decedent had before the signing of the paper in question wholly parted with his seisen and possession of all his real estate, and there was then nothing on which the alleged will could be operative.

Points.

I.

The court had not jurisdiction to proceed to trial.

Prior to the Act of 1898, the Probate Court of the District of Columbia had no power or jurisdiction in respect to last wills or testaments, except to pass

upon their factum and determine that their form and attestation were sufficient under the provisions of the law.

All power it now has besides, apart from that relative to matters of guardianship and to administration bonds given by Act of February 20, 1846, is derived from, and strictly governed and limited by the Act of Congress approved June 8, 1898.

The case at bar is the first raising question of the force, proper construction and limitation of that act. Its provisions are sufficiently set forth on pages 29, 30 and [illegible] of the printed record, thus requiring no repetition in *extenso*.

The grant of jurisdiction there given "to hear and determine all questions relating to the execution and to the validity of any and all wills devising any real estate within the District of Columbia," etc., "subject, nevertheless, to the provisions * * * contained" in the act, was an entirely new grant of power, accompanied with specific and minute statement of how the power should be exercised—therefore mandatory and limited.

In carrying the law into effect, each step must be taken by the court in strict conformity to the statute, or the court transcends its jurisdictional bounds, and its acts are void.

Until each and every of the steps prescribed shall have been taken in such conformity with the terms of the statute, the court has no jurisdictional power to admit a will to probate and record.

The statute is *mandatory* in respect to the provisions laid down.

> "Where legislation points out specifically how an act is to be done * * * it must be

> strictly pursued. Where a statute in granting a new power prescribes how it shall be exercised, it can lawfully be exercised in no other way. The grant is strictly construed—the mode must be strictly pursued."
>
> Sutherland on Statutory Construction, § 454.

Now, Section 6 of the Act (v. Rec., p. 30,) requires that when the specified parties in interest have not been brought into court by a specified personal service, the court shall assign a day for trial and cause service to be made on such parties by publication of "copy of the issues and notification of trial" in a specified manner and period.

Accordingly, in this case (v. Rec., p. 7), the court, on the 26th of January, 1900, passed its order setting the issues down for trial on February 26th, 1900, and that such order and the "issues framed shall be published twice a week for four weeks."

Under this, proof was subsequently made (Rec., p. 9,) that publication was made on Friday, January 26, Tuesday, January 30, Friday, February 2, Tuesday, February 6, Friday, February 9, Tuesday, February 13, Friday, February 16, and Tuesday, February 20. And thereupon, without further order, setting for trial and publication, the court proceeded for trial on March 5, 1900, (Rec., p. 10).

We claim that the court, in this regard, did not conform to the procedure laid down by the statute, and so did not acquire jurisdiction to try.

(a) The law requires service of copy of the issues and notification of time and place of trial to be actually made "at least ten days prior to the time of trial." Necessarily, this means the day of trial set down in the order.

The publication provided for is in place of such personal service. The entire period of publication necessarily, therefore, must be complete "at least ten days prior to the time of trial" named in the order as published, and this is entirely compatible with the court's appointment of a subsequent day, only, that must be after it shall have previously acquired jurisdiction by a completed period of service publication.

(b) Again, the order was to publish "twice a week for four weeks," and apart from the requirement in respect to ten days after completed publication prior to the day set for trial, it is insisted that this means twice in each week as designating in universal common parlance that series of days called the week, "numbered or named (v. Century Dic., ad verb.), in succession Sunday (or first day, etc.), Monday, Tuesday, Wednesday, Thursday, Friday, Saturday." "2. The six working days of the week; the week minus Sunday." (v. also 4 Pet., 349-361; 4 Dana, (Ky.), 126, Thurston v. Masterson; 12 Cal., 100, Jordon v. Giblin; 23 How., Pr. R. (N. Y.), 516, Richardson v. Bates.)

All the authorities of decided cases go to show that jurisdiction cannot be maintained without the strictest and fullest compliance with the requirements of the statute. (v. Settlemier v. Sullivan, 97 U. S., 444; Hernandez v. Creditors, 57 Cal., 333; Estate of Koch, 19 N. Y. Civ. Pr., 165; 139 U. S., 137-145.)

There were, then, but three weeks in which the publication was made "twice a week." Publication once a week in two other weeks cannot cure the disregard of the statute and of the order. More nearly

had it been responsive to the law had the publication been on the Friday and Saturday of the first week.

(c) The court failed also of jurisdiction when it ignored the mandate of the Act (end of Sec. 4) "in no case shall any will or testament be admitted to probate or record save upon formal proof of its proper execution."

Words could not be framed more clear, effective or conclusive, yet the court, having assumed the prerogatives of the jury and directed their verdict, by sheer momentum proceeded (Rec., p. 13,) to adjudge, order and decree the alleged will "admitted to probate and record," taking no "formal proof of its execution."

Consent could not cure this omission. Due execution of the will is a vital, affirmative allegation, and the Act says no will or testament, even though not caveated, shall be admitted to probate without proof of the formal execution, that is, e. g. of the signing and declaring in the presence of the number of witnesses required by the statute, and that such witnesses, at the testator's request, attested the execution in his presence and in the presence of each other. (v. Trust Co. v. Heiberger, 30 W. L. R., 309.)

Can it be for a moment thought that the failure of a caveator to sustain his contention of insanity or undue influence obviates the need of these proofs to make the will of real estate operate to carry title?

II.

It was error in the case at bar for the court to take the facts from the jury and direct their verdict.

The manifest intent of the law is that the issues

framed shall be passed upon by a jury. Possibly we may not say the statute made them to be judges of law as well as of fact. But it is worthy of consideration that the act (sec. 6) requires that all persons interested shall be sui juris, and before the court, and all consent in writing before the court may assume to try and determine the issues without the jury; and yet in directing a verdict the judge in fact supplants the jury and subverts the law.

But apart from this, it surely cannot be said that there was no scintilla of evidence before the jury tending to prove any of the issues in favor of the caveators.

The facts in evidence on which we rely in support of this proposition, both as to the testator's incapacity and the undue influence to which he was liable and presumably subjected, appear in the bill of exceptions. (Rec. pp. 15-24.)

Briefly they may be grouped as follows:

The decedent was a man in extreme old age—long given to an eccentric and isolated life—the child of a deranged mother—on his death bed—in articulo mortis—in the *last hour* of acute bronchial pneumonia, attended by rheumatism, inguinal hernia, cardiac hypertrophy, and senile debility, which medical experts testified would tend to impair the mind and render it incapable of intelligently acting on a question of making a valid will or disposition of property. In a moment like this, off-hand, he is invited and led to sign a paper which for no cause ignored every tie of blood and relationship—which disinherited every one to whom the ripe, matured policy of the law and harmonious judgment of all mankind in all civilized ages regard as natural and

necessary subjects of affection, care and provision, and allow rights of inheritance, and feebly signing his name, not in his customary way, but by initials, the pastor of his church secures from him a paper, giving all to the colored boy in decedent's employ, with the understanding that the latter will convey certain real estate to his church—a disposition of his property apparently then first thought of, and one which, had he before contemplated it, he might have made long before his mortal illness came upon him, and certainly would have done so had such a thing entered his mind.

And yet, most singularly, the appellate court of the District of Columbia, in reviewing the action of the trial judge in taking the case from the jury, passed over in silence and ignored the issue of mental capacity *vel non*. The opinion of the court deals with the question whether there was any evidence to sustain the issue of undue influence only.

Before passing to the citation of some decisions calculated to illustrate this point, and in anticipation of an objection which the defense may possibly raise, we desire to say in respect to the proof of the cause of decedent's death, as shown in Record at page 19.

The certificate of decedent's death, admitted in evidence was sufficient in law to establish *prima facie the cause of death*, so as to preclude the necessity of establishing this by other independent evidence, in the presentation of caveators' evidence in chief.

> "The rule rejecting secondary evidence is subject to some exceptions; grounded either on public convenience, or on the nature of the

facts to be proved. Thus, the contents of any record of a judicial court, and of entries in any other public books or registers may be proved by an examined copy. This exception extends to all records and entries of a public nature, in books required by law to be kept; and is admitted because of the inconvenience to the public which the removal of such documents might occasion, especially if they were wanted in two places at the same time; and also because of the public character of the facts they contain, and the consequent facility of detection of any fraud or error in the copy."

1 Greenleaf on Evidence, § 91.

"The joint resolution of April 24, 1880, made the ordinances of the Board of Health the law of the District of Columbia"

D. C. vs. Gas Light Co., 3 Mackey, 343.

"The record kept by a person employed in the Signal Service of the United States, whose public duty it is to record truly the facts therein stated, is *competent evidence of such facts.*"

Evanston vs. Gunn, 99 U. S., 660.

Section 4 of the Regulations of the Board of Health (legalized by the Act of April 24, 1880, 3 Mackey, 343,) provides:

"Fourth. That whenever any person shall die within the District of Columbia it shall be the duty of the physician attending such person during his or her last illness to furnish certificate, duly signed, setting forth *the cause*, date and place *of death*."

Richardson's Supp. to R. S. U. S., Vol. 1, 2nd ed. 187-41891, p. 310.

And in support of our general proposition that the court erred in directing what verdict the jury should return, we cite decisions as follows:

> "In an action to contest the validity of a will on the ground of want of testamentary capacity and undue influence, an instruction which lays down the rule without qualification that, in determining whether the writing produced was the will of the testator, the jury have nothing whatever to do with the propriety or impropriety of the bequests mentioned in said writing, or as to whether said bequests were just or unjust, or as to whether such bequests should or should not have been made" is erroneous, since in such a case all the surrounding circumstances including the bequest itself, are proper and material to the determination of the issue.
>
> McCommon v. McCommon, Sup. Ct. Ill., June, 1892, 31 N. E. 491.

> "The fact is not disputed that, being advanced in years, he was laboring under the infirmities, both physical and mental, usually incident to old age, but as to whether he still retained that degree of mental capacity necessary to render him capable of making a valid will, the witnesses are greatly at variance. The question presented is purely one of fact and it was therefore, preeminently a matter for the jury to determine, and their verdict should not be disturbed unless we are able to say that it is clearly and manifestly against the weight of the evidence."
>
> McCommon v. McCommon (1894) 151 Ill., 428, 436.

> "In order to justify a trial court in directing a verdict, the evidence *and all proper inferences*

from it, must make so plain a case that all reasonable men would be driven to one and the same conclusion thereon."

Olmstead v. Webb, 5 App. C., 38.

"When in the trial of an issue involving the testamentary capacity of a testator, the testimony of the caveators, if true, would justify a verdict in their favor, it is proper for the trial court to refuse to direct a verdict on that issue for the caveatees."

Hardy v. Wise, 5 App. C., 108.

"When there is evidence *tending* to establish the issues on the plaintiff's part, it is error to take the case from the jury."

U. S. v. Chidester, (1891) 140 U. S., 49.

"When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not the determination of the matter is for the jury. It is only where the facts are such that *all* reasonable men must draw the *same* conclusion from them the question of negligence is ever considered as one of law, for the Court.

R. R. Co. v. Ives, (1891,) 144 U. S. 408,417.

"Where, in an action against a common carrier to recover damages for injuries to a passenger, there is *uncertainty* as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair minded men will honestly draw different conclusions from them."

R. R. Co. v. Powers, (1893,) 149 U. S., 43.

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"A case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon *any* view which can be properly taken of the facts the evidence tends to establish."

Gardner v. R. R. Co. (1893) 150 U. S., 349.

"Where the court has misdirected the jury, *and the chances are equal*, that the verdict resulted from the error of the judge, a new trial will be granted."

3 Graham & Waterman of New Trials, 872.

And here let it not be overlooked that this decedent, an old man, eccentric in character, in the weakness of a mortal illness, calculated to greatly disturb if not paralyze his memory of kindred and of those dear to him by ties of blood, only two hours before his dissolution, with no opportunity to reflect upon or even recognize anything beyond that suggested to him by those in his immediate presence, is suddenly called to place his name to a paper, the effect of which is to disinherit all his lawful heirs and transfer all his estate to a lad in his employ, having no claims upon him but for his wages.

This very disherison of his heirs is in itself strong evidence of a state of mind incapable of making a valid will.

The citations of authority made in the opinion of the court in Delafield vs. Parish (25 N. Y. Rep. 9 &c.) are very pertinent on this point.

Quoting from the Marquis of Winchester Case (6 R., 23 a) the court adopts this, "by law it is not sufficient that the testator be of memory when he makes his will to answer particular and usual questions; but he ought to have a disposing memory,

so that he is able to make a disposition of his lands with understanding and reason." p. 23.

And quoting from the decision in Marsh vs. Tyrrell (2 Flagg, 122), the court approves these words:

> "It is a great but not uncommon error to suppose that, because a person can understand a question put to him and give a rational answer to such question, he is of perfect sound mind and capable of making a will. The competency of the mind must be judged of by the nature of the act to be done—from a consideration of all the circumstances of the case."

Quoting from Erskine, J., in Harwood v. Baker:

> "In order to constitute a sound disposing mind a testator must not only be able * * * but must also have capacity to comprehend the nature of the claims of others whom by his will he is excluding from all participation,—whether at that time he was capable of recollecting who those relations were,—of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property."

Again, (p. 25) the language of the Chief Justice in 2 Southard, R. 454, is quoted: "A disposing mind and memory is a mind and memory which has the capacity of recollecting, discerning and feeling the relations, connections, and obligations of family and blood."

And on p. 26 the court approves the words of Chancellor Walworth in Clarke v. Fisher, 1 Paige, 171, as to the capacity of a person to make a will.

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> "He must be of sound and discerning mind and memory so as to be capable of making a testamentary disposition of his property with sense and judgment in reference to the situation of such property, and to the relative claims of different persons who are or might be the objects of his bounty."

And very wisely said the N. Y. Court of Appeals in the Delafield-Parish Case (p. 35.):

> "It is not the duty of the court to strain after probate * * * The heirs of a deceased person can rest securely upon the statutes of descents and distributions and that the rights thus secured to them can only be divested by those claiming under a will by showing that the will was executed with the formalities required by law, and by a testator possessing a *sound and disposing mind and memory*."

See also Insurance Co. v. Doster, 106 U. S., 30; Randall v. R. R. Co., 109 U. S., 478; Humiston v. Wood, 124 U. S., 12.

In the light of the foregoing citation of authorities, it is submitted that the caveators did adduce evidence entitling them to go to the jury, and that it was reversible error for the trial court to direct their verdict.

The plaintiffs in error present and submit for the consideration of this court two further propositions:

1st. A last will and testament is an instrument in writing, executed with due formalities by a legally competent person, possessed of a sound and dispos-

ing mind and memory, to declare his intention in respect to the disposition of his property after his death.

The evidence conclusively shows that the paper in this case propounded for probate does not express the intention of the testator, but was a suddenly suggested makeshift for getting the property to a religious organization, despite the prohibition of law.

2d. At the time this paper was signed the signer had already made conveyance of all his property by deed signed, sealed, acknowledged and delivered.

There could, therefore be no valid operative will, nothing to devise, no intention of devise.

For the further presentation of the argument, and fuller reference to the authorities on these as well as the preceding points the consideration of the court is respectfully called to the appendix herewith filed.

On all which the plaintiffs in error pray the court to reverse the judgment of the court below and remand the cause with directions to vacate the probate of the alleged will, and grant a new trial under such instructions as this court shall deem appropriate, and that their costs in this behalf sustained be awarded against the proponent of said alleged will and his codefendants in error.

Respectfully submitted,

WILLIAM A. MELOY,

Attorney and Counsel for Plaintiffs in Error.

APPENDIX.

Errors.

1. The Orphans' Court of the District of Columbia erred in assuming jurisdiction to admit to probate the paper-writing offered as the last will and testament of decedent.

2. The trial Court erred in directing a verdict; and the Court of Appeals of the District of Columbia erred in affirming said ruling.

Points.

1. The Orphans' Court had not jurisdiction to admit to probate and record the alleged will of decedent:

(*a*) Because the plenary jurisdiction conferred by the Act of June 8, 1898, section 2 (now section 117 of the Code) is "to hear and determine *all* questions relating to the *validity* of any and all wills devising any real estate within the District of Columbia"; and a will incapable of operation cannot be said to have "*validity*."

(*b*) Because there is a limitation upon the power to devise, that is the *res* must be devisable, and decedent must have devisable interest in the *res*.

(*c*) Because a will cannot be said to have "validity" which secretly attempts to evade. (Section 457 of the Revised Statutes of the United States relating to the District of Columbia; re enacted by section 1635 of the Code for the District of Columbia.)

(*d*) Because the secret trust referred to, and subsequently carried out, indicates that the paper-writing offered does not contain *all* of decedent's will. (27 Henry VIII, Cap. 10 A. D. 1535).

(*e*) Because there was no proof of the execution of the alleged will.

(*f*) Because there was no jurisdiction to try the issues for want of due statutory publication.

(*g*) Because under section 2 of the Act of June 8, 1898 (now section 117 of the Code) a will can only be said to have "validity" and to be entitled to probate, when there is a concurrence of four conditions: first, the *res* must be devisable; second, decedent must have devisable interest in the *res* at the time of the execution; third, the devise must be voluntary and ambulatory, and fourth, the testator must have testamentary capacity.

(*h*) Because, when the pastor of a church is an attesting witness to a devise to his church (even though the devise be secret), it is void under Stat. 25, George II, Ch. 6, Sec, 1, although he is a competent witness; perpetuated by section 1 of the Code.

2. The trial court erred in holding the evidence adduced by plaintiff in error insufficient to entitle them to go to the jury, and in directing a verdict.

(*a*) Because the medical testimony tended to show incapacity;

(*b*) Because the total disherison of the heirs, without naming them, tended to show incapacity. (27 Henry VIII, Cap. 10, A. D. 1535);

(*c*) Because the confidential relations between devisor and devisee cast the burden of proof upon the latter to sustain the alleged will;

(*d*) Because the act of signing a will, *after* signing a deed, (both professedly covering the same property) *itself* indicates want of testamentary capacity.

Argument.

(1*a*) The Act of Congress (upon which the proceeding herein is based) was approved June 8, 1898, and entitled "An Act conferring on the Supreme Court of the District of Columbia jurisdiction to take proof of the execution of wills affecting real estate, and for other purposes." Section 2 thereof (now section 117 of the Code) provides:

> "That in addition to the jurisdiction conferred in the preceding section of this act, plenary jurisdiction is hereby given to the said Court holding the said special term to hear and determine all questions relating to the execution and to the validity of any and all wills devising any real estate within the District of Columbia, and of any and all wills and testaments properly presented for probate therein, and to admit the same to probate and record in said special term; and neither the execution nor the validity of any such will or testament so admitted to probate and record shall be impeached or examined collaterally, but the same shall be in all respects and as to all persons res judicata, subject, nevertheless to the provisions hereinafter contained."

The last clause of section 6 (now section 140 of the Code) also provides:

> "In all cases in which such issues shall be tried the verdict of the jury and judgment of the Court thereupon shall, subject to proceeding in error and to such revision as the common law

> provides, be res judicata as to all persons, nor shall the validity of any such judgment be impeached or examined collaterally."

The conclusion therefrom seems to be that a will affecting real estate in the District of Columbia, besides being duly executed by a competent person, must be "valid" in order to entitle it to probate and record. If, therefore, for any reason it is not "valid," probate should be denied. One of the reasons that might render a will not "valid" is, that it is incapable of operation upon property; because the decedent never owned the property referred to in the will, or because the decedent parted with the property named in the will by a conveyance prior thereto *inter vivos* taking effect in *praesenti;* or because, after the execution of the will he altered the seisin thereof by a conveyance *inter vivos* taking effect in *praesenti*, and thereby in effect revoking the will.

The case at bar is an illustration of a will being not "valid," and therefore not entitled to probate, because decedent parted by deed *in praesenti* with the title to the same property covered by the will, if he had any mental capacity for the act at all. The Act referred to should be read and construed in the light of the decision of this court in the subjoined case, because the aim of the Act was remedially to cure the absence of jurisdiction therein pointed out. It supplied a power not theretofore existing:

> "The Supreme Court of the District of Columbia, sitting as an orphans' court, upon an application for the probate of a will of real estate, is without jurisdiction to determine upon its sufficiency to pass the real estate devised thereby." (Campbell v. Porter, 24 W. L. R., 294; 162 U. S., 478.)

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> "The *validity* of a will of real estate is to be determined by the laws and by the courts of the jurisdiction in which such real estate is situated, and not by any other law or any other tribunal." (Readman v. Ferguson, 13 App. C., 60.)

That the Congress did not intend that "invalid" instruments should be probated is further illustrated by section 15 of the Act of March 3, 1901 (Public No. 171) substantially reproduced by the amendment of section 290 of the Code, approved June 30, 1902, which is as follows:

> "And if any will be hereafter adjudged *invalid* in any action begun after distribution of the estate, or any part thereof, lawfully made by the executor or executrix, in good faith and without knowledge on his or her part of the invalidity of such will, and without notice that such action was intended, the distributee or distributees of the property, and their personal representatives, and not such executor or executrix shall be answerable for the property, or its value, to the person or persons thereto entitled."

(1*b*) There is a limitation upon the power to devise; that is, the *res* must be devisable, and decedent must have a devisable interest in the *res*. A will drawn in contravention of these principles is not "valid" within the meaning of the Act in question.

Section 1623 of Code: "What may be devised. All lands, tenements, and hereditaments, and personal estate which might pass by deed or gift, or which would, in case of the proprietor's dying intestate, descend to or devolve on his or her heirs or other representatives, shall be subject to be disposed of, transferred, and passed by his or her

last will, testament, or codicil under the following restrictions:

Section 1625. "Who capable of making will." No will, testament, or codicil shall be good and effectual for any purpose whatever unless the person making the same be, if a male, of the full age of twenty one years, and if a female of the full age of eighteen years, and be at the time of executing or acknowledging it, as hereinafter directed, of sound and disposing mind, and capable of executing a valid deed or contract."

"The *power* to dispose of property by will is neither a natural nor a constitutional right, but depends wholly upon statute, and may be conferred, taken away or limited, or regulated in whole or in part by the legislature. (Brettun v. Fox, 100 Mass., 234.)

The *power* of testamentary disposition extends to all interests in real and personal estate, which at the decease of the testator, would, if not so disposed of, devolve to his general, real or personal representatives. (1 Jarman on Wills, 5th Ed. Big.) p. 46.

"The will only operated upon such real estate as the testator possessed at the time of making it at common law and under the earlier English Statutes," (Redfield on Wills, p, 333, § 26.)

"No paper can be deemed testamentary and entitled to probate as a will, unless the benefit it confers is postponed to the death of the party who confers it. (Schouler on Wills 2nd Ed., § 272.

"All estates which are transmissible, either by operation of law, or by the act of the owner, are held devisable. (Redfield on Wills, p. 388, § 16.)

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"This brings on the consideration of the 2nd question: which is whether such right of entry be devisable; and we are of opinion that it is not devisable." (Goodright v. Forrester (1807), 8 East Rep. 551, 567.)

"A right to land under the proclamation of 1763, before warrant obtained, was a devisable interest." (Gist v. Robinet (1813), 3 Biff, Ky., 2.)

"To give effect to a devise, the testator must not only be actually seized of the land devised at the time of making his will, *but must continue seized to the time of his death*, A conveyance, therefore, by the testator of the land devised is so far a revocation of his will." (Minuse v. Cox, 1821, 5 Johnson's Ch. Rep., N, Y., 441, 450.)

"According to the established law of New York, nothing passed under the ulterior devise over to John Eden and Hannah Johnson: Medcef Eden on the death of his brother, Joseph Eden, became seized of an estate in fee-simple absolute." (Waring v. Jackson, 1828; 1 Pet., 570.)

"*Semble*, that the reversion in fee of B. was devisable, notwithstanding the discontinuance. *Sed quaere.*" (Doe v. Finch, 1832; 1 Neville & M. Rep., 130.)

"V's testamentary disposition of her whole estate in favor of C did not include the estate devised to her by C. It was the mere expectancy of a benefit to be derived from the will of C, not the subject of a testament." (Glenn v. Belt, 1835; 7 Gill, 363.)

This limitation of power is well expressed in the Statute 1 Victoria, Cap. 26, which though not in force in this District, (being enacted A. D. 1837) yet

recapitulates the older British law on the subject, which is in force here. (5 Peters 367; 14 Peters 145; 5 Howard 81; 14 Howard 415; 117 U. S. 665; 174 U. S. 229, 240; Section 1 of Code for the District of Columbia.

Section 3 thereof provides:

> "And be it further enacted, that it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, *at the time of his death*, and which if not so devised, bequeathed, or disposed of would devolve upon the heir at law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the *power* hereby given shall extend to all real estate * * *

Section 23 also directs:

> "And be it further enacted, that no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate *as the Testator shall have power to dispose of* by will *at the time of his death.*" (A. D. 1837) 1 Victoria, Cap. 26, Sec. 23.

> "Held, that the clause in question, in the events which happened, did not operate upon those negroes; that there was an intestacy as to them." Hardic v. Cotton (1804). 1 Iredells Eq. (N. C.,) 61, 64.

> "An instrument, limited by a condition as to its operation, cannot be admitted to probate as

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a will after failure of the contingency, on the happening of which it was to have taken effect." Todd's Will, 2 Watts & S. (Pa), 145.

"This deed was not a testamentary paper, and the order of the Orphans' court directing it to be recorded as such, was null and void." Robey v. Hamon, 6 Gill, 346 (1845.)

"A legatee or devisee who is a child or descendent of a testator, and who dies, leaving children surviving him, before the testator, can not by his will dispose of a legacy or devise given him by the will of the testator." Pate v. Pate, (1866) 40 Miss., 750.

"E had no interest in the share bequeathed to her which she could dispose of by will, until after the death of her mother; and that the will of E. prematurely made, could not defeat the gift over to the grand daughters." Estate of Hall, (1866) 26 Md., 107.

"The testator wrote a codicil with his own hand which concluded as follows: 'I give my wife the option of adding this codicil to my will, or not as she may think proper or necessary. Held, that the validity of this paper was conditional on the assent of the wife and that as she elected not to avail herself of its provisions, it ought not to be included in the probate." (In the goods of John Smith, 1869; 1 Law Rep. Probate, Divorce and Matrimonial, England, p. 717.)

"An agreement of two saving bank depositors that the survivor shall have the other's deposit, each retaining the absolute title and control of his deposit during life, is a testamentary disposition of property not made according to the Statute of Wills, and is invalid." (Towle v. Wood, 60 N, H., 434.)

"The will did not operate on joint and several notes made by the testator, between the date of the will and his death." (Waterman v. Alden, 1892; 143 U. S., 196.)

"The general presumption that a person intends to die testate of all his property, and the fact that the heirs of the testator never questioned the right of the testator to take the property in controversy, notwithstanding the lapse of 30 years from the date the will went into effect, are not sufficient grounds upon which to base a legal inference that the title of the property was vested in the testator when he made the will." (Reeves v. Low, 8 App. C., 105.)

"It was held that as the alleged will was conditioned upon the happening of an event which never took place, namely, the failure of the testatrix to return from her then projected journey, the paper never went into effect as a will. (Eaton v. Brown *et al.*, 30 W. L. R., 746; decided November 4, 1902.)

While the above quoted authorities seem to establish that there is a limitation upon the power to devise, it might be questioned, in view of the following decision, whether the Orphans' Court is the proper tribunal to raise and decide the matter of the operativeness of a will.

"Under the Married Woman's Act of this District a wife is capacitated to make a will without the consent of her husband; what the will is to operate upon is another question, and one which the Orphans' Court has no jurisdiction to pass upon; its power extends only to inquire into matters which relate to the probate, such as testamentary capacity, fraud, undue influence, and the due execution of the instrument.

> When the probate is granted, and not before the authority to determine what passes under the vill is devolved upon the courts of law and equity." Emmons v. Garnett' 1888; 18 D. C., 52.

This decision is, however, to be read in the light of the jurisdiction of the Orphans' Court, as it *then* existed (Campbell v. Porter, 162 U. S., 478); but since the Act of June 8, 1898 (now incorporated into the Code) expressly gives to the Orphans' Court plenary jurisdiction to hear and determine *all* question relating to the execution and to the *validity* of any and all wills devising any real estate within the District of Columbia," (Sec. 117 Code) it is submitted that the Orphans' Court now is the proper place, and the application for the probate of such will, the proper time to hear and determine a question relating to the devisable interest of the testator in the property in question, and hence the "validity" or invalidity of the will offered. This should especially be true where the question is: Does the will operate at all?

By the authority of section 14 of rule 8 of this Court, the original deed and will have been sent up to this Court by the Orphans' Court.

(1c) A will cannot be said to have "validity" which secretly attempts to evade the Statutes of the District of Columbia, which refer to devises for charitable uses:

> "That every gift, sale or devise of lands, to any minister, public teacher or preacher of the gospel, as such, or to any religious sect, order or denomination, or to or for the support, use or benefit of, or in the trust for any minister, public teacher or preacher of the gospel, as such, or

any religious sect or denomination and every gift or sale of goods or chattels to go in succession, or to take place after the death of sellor or donor, or to or for such support, use or benefit, and also every devise of goods or chattels to or or for the support, use or benefit of any minister, public teacher or preacher of the gospel, as such, or any religious sect, order or denomination without the leave of the legislature, shall be void, except always any church, meeting or other house of worship and for a burying ground, which shall be improved, enjoyed or used only for such purpose—or such sale, gift, lease or devise shall be void." (Section 34 of the Declaration of Rights of Maryland, August 14, 1776.)

"The thirty-fourth section of the Declaration of Rights of the State of Maryland, adopted seventeen hundred and seventy-six. so far as the same was recognized and adopted in the District prior to July twenty-fifth, eighteen hundred and sixty-six, is repealed and annulled, and all sales, gifts and devises prohibited by said section, or by any law passed in accordance therewith are, when made, valid and effectual: Provided, That in case of gifts and devises, the same shall be made at least one calendar month before the death of the donor or testator." Section 457, R. S. D. C., re-enacted by Section 1635, Code D.C., and here in passing we remark that, as it appears in Record, p. 5, a motion was made and overruled asking the addition of an issue presenting the question of the validity of the will. This judicial order being made in the Orphans' Court, an exceptiou thereto is not necessary in order to enable this court to review the accuracy or want thereof of said order.

(See Kenaday v. Smith, 179 U. S., 606.)

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(1*d*) When the alleged will offered for probate is silent as to any charitable disposition to be made of the whole or a part of the decedent's property, and one of the attesting witnesses thereto deposes that such direction was given, it may well be doubted whether the paper-writing offered contains all of the last will and testament of decedent.

> "Where by the common laws of this realm, lands, tenements, and hereditaments be not devisable by testament * * * yet, nevertheless, divers and sundry imaginations, subtile inventions and practices have been used, whereby the hereditaments of this realm have been conveyed from one to the other by fraudulent feoffments, fines, recoveries and other assurances craftily made to secret uses, intents and trusts, and also by wills and testaments, sometimes made by nude parolx and words, sometimes by signs and tokens and sometimes by writing, and for the most part made by such persons as be visited with sickness, in their extreme agonies and pains, or at such time as they have scantly had any good memory or remembrance, at which times they being provoked by greedy and covetous persons lying in wait about them, do many times dispose indiscreetly and unadvisedly their lands and inheritances, by reason whereof and by occasion of which fraudulent feoffments, fines, recoveries and other like assurances to uses, confidences and trusts, divers and many *heirs have been unjustly* at sundry times *disherited.*" *Statute* 27, *Henry VIII, Cap.* 10. (*A. D.* 1535.)

(1*e*) It will be observed (Rec. p. 10) that Caveators were made plaintiffs, and that upon the close of their testimony in chief a motion was made by Caveatees to withdraw the case from the jury and to

direct a verdict (Rec. pp. 24-25), which said motion prevailed. Also that Caveators read only so much of the deposition of one Hugh T. Stevenson, adduced as a witness by the Caveatees, as tended to show that on the day of the decedent's death a deed was prepared by witness conveying the same real estate mentioned in the will from decendent to the same Lucus mentioned as beneficiary in the will. (Rec. p. 21.) Stephenson was one of the attesting witnesses to the alleged will. There was no other testimony whatever on the subject of the execution of the will- Section 4 of the act of June 8, 1898 (now section 135 of Code), directs :

> "Provided, that in no case shall any will or testament be admitted to probate and record *save* upon formal proof of its execution."

In the case at bar the will was admitted to probate (Rec. p. 12–13) without such proof.

Proof of the formal execution of the will offered for probate and record cannot under the act of June 8, 1898 (see also D. C. Code, Sec. 135), be dispensed with by the admission of parties filing a caveat thereto or the consent of all concerned. (Trust Co. v. Heiberger, 30 W. L, R., 309.)

(1*f*) The trial court had no jurisdiction to try the issues, in absence of due publication as prescribed by section 6 of the Act of June 8, 1898 (now section 140 of the Code), which directs :

> "That whenever any caveat shall be filed issues shall be framed under the direction of the Court for trial by jury. If as to any party in interest, the notification shall be returned "not to be found," the Court shall assign a new day

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> for such trial, and shall order publication at least twice a week for a period of not less than four weeks of a copy of the issues and notification of trial in some newspaper of general circulation in the District of Columbia, and may order such other publication as the case may require."

The notification having been returned "Not to be found," as to eleven of the heirs of decedent (two of whom however appeared before the notification and filed a caveat to the alleged will and now join in the prosecution of this writ of error, to wit: Cyrus P. Reed and Gustavus L. Reed) (Rec. p. 7) the court directed publication in the manner prescribed by section 6 above quoted. The proof of publication (Rec. p. 9) shows that publication was made on the 26th and 30th days of January, 1900, and on the 2d, 6th, 9th, 13th, 16th and 20th days of February, 1900. The 26th day of January, 1900, was a Friday, and the 20th day of February, 1900, was a Tuesday, and there was no other publication during those respective weeks.

> "A week is a definite period of time commencing on Sunday and ending on Saturday." (Ronkendorff v. Taylor's Lessee, 1830; 4 Pet., 349, 361.)

That statutes prescribing the manner of publication as a substitute for personal service of process, are construed with the greatest strictness is evidenced by the subjoined citations:

> "By the general law of the land no Court is authorized to render a judgment or decree against anyone, or his estate; until after due notice by service of process to appear and de-

fend." Hollingsworth v. Barbour, 1830; 4 Pet., 466, 472.

"Publication againt absent defendants must begin and be continued, as long before the appearance day as the law requires, otherwise they will be nugatory." Thurston v. Masterson; 1836; 4 Dana, Ky., 126.

"Where service is attempted in a mode different from the course of the common law, the statute must be strictly pursued to give jurisdiction." (Jordan v. Giblin, 1859; 12 Cal., 100.)

"Where an order of publication of the summons is made for six weeks once in each week, the service is not complete until the expiration of the six weeks, or forty-two days, although the publication be made six times in as many successive weeks short of that period." (Richardson v. Bates, 1861; 23 How. Pr. Rep. N. Y., 516.)

"Where the statute requires that notice shall be published in a newspaper for four weeks, it is not sufficient to publish such notice for twenty days." (Crary v. Barber, 1869; 1 Colorado, 172, 174.)

"Under the twenty-fourth section of the Statute of New York, in regard to limited partnerships (R. S., 767), requiring notice of dissolution, previous to the time specified in the certificate of its formation, to be published once in each week, for four weeks, the day of the week which is taken for the first publication must be taken for each of the subsequent publications." 1872; King bankrupt, 5 Benedict's Dist. Ct. Rep., U. S., 453.

"Held that the Court, by such service, ac-

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quired no jurisdiction over the person of A, and its judgment was void." Settlemier v. Sullivan, 1878; 97 U. S., 444.)

"The words, 'at least once a week for four successive weeks' require, in effect, that there should be four publications not more than seven days apart from each other." Hernandez v. His Creditors, 1881; 57 Cal., 333.

"Held that the publication was insufficient, and that the board did not acquire jurisdiction, there being two intervals of more than seven consecutive days in the publication." Williams v. Board, 58 Cal., 237.

Under section 2 of the Act of March 9th, 1875, p. 97, notice of the pendency of a petition to establish a ditch must be published for four consecutive weeks, and notice published for one day less than that time is irregular and voidable." (Muncey v. West, 1881; 74 Ind., 409.)

"Where, therefore, after the granting of an order of publication, summons was served on defendant out of the State, November 25, 1881, and judgment by default was entered January 20, 1882, held, that the judgment was premature; and that an order setting it aside was properly granted." (Bank v. Bank, 1882; 89 N. Y., 397.)

"A statutory foreclosure sale must not be made for twelve full weeks after the first pulication of notice thereof; twelve weekly publications before sale do not of themselves make the sale valid." (Bacon v. Kennedy; 1885; 56 Mich., 329.)

"To effect service by publication the citation must be published, and should be made for full twenty-eight days once in each week for four

weeks." (Davis v. Robinson, 1888; 70 Tex., 394.)

"Service of a citation issued out of a surrogate's court when made by publication, is not complete until the expiration of at the least six full weeks from the time of the first publication." (Est. of Koch., 1890; 19 N. Y., Civ. Pr., 165.)

"A provision in a statute authorizing notice to be given to an absent defendant to appear, by publishing the same in a newspaper once a week for four months, is not satisfied by a publication once a week for four lunar months, but the word "month" when so used signifies a calendar month. To support a decree for foreclosure against an absent defendant brought in by publication for the full period required is necessary." (Trust Co. v. R. R. Co., 1891; 139 U. S., 137, 145.)

"Where the land of a non-resident is sold under decree of the United States Circuit Court, the sale is void if it does not appear from the record that publication of the warning order was made for the length of time required by the Federal Statute." Trust Co. v. Res. Co., 1893; 94 Ky., 271.

"It was error to render judgment against a defendant who was cited by publication, and who appeared only by attorney appointed by the Court, where the citation was not published once a week for four consecutive weeks as required by Rev. St., Art. 1235." Blackman v. Harry, 1896; 35 S. W. Rep., 290.

The heirs of decedent, who were not before the Court, unless this Court reverses the judgment complained of, are yet bound by the judgment, under the subjoined decisions.

"Where, however, issues have once been transmitted, and there has been a verdict upon them which has been certified to the Orphans' Court, such verdict unless vacated by some proper proceeding, is binding upon that Court and upon all the world; and it is the duty of the Court to enter judgment thereon in accordance with the verdict. Such verdict and judgment then become conclusive of the issues, and the Orphans' Court cannot thereafter direct any further or other litigation of the same issues at the instance of anyone. * * *

"Different issues affecting the validity of the will on different grounds may be successively sent to the same or a different jury for trial, on behalf of the same or other caveators. But there is no warrant in law or in reason for a second trial of issues that have been legally determined by a jury. The theory of *res adjudicata* is against such a course." (Dugan v. Northcutt, 7 App. C., 351.)

Held * * * That the parties who had not not appeared and were not before the Court in the previous proceedings were nevertheless bound thereby, since issues once properly tried cannot be retrled at the instance of another party." (Est. of Francis S. Obold, 30 W. L. R., 345.)

(1*g*) A will cannot be said to have "validity" within the meaning of the Act of June 8, 1898 (Section 117 of Code) unless all legal conditions prescribed concur in the instrument offered, and it is not entitled to probate unless "valid."

"Held that the state of the evidence leaves it in doubt whether the *animus testandi* manifested at one tims by the deceased continued with her to the time of her decease, or during her testamentary capacity, after the preparation

of the paper, and that the Orphans' Court was in error in admitting the proposed will to probate." Morsell v. Ogden, 1865; 24 Md., 377, 382.)

"When the paper creates a common fund of real and personal estate, or where the disposition of real and personal estate is so blended that the intention of the deceased, in respect to the one estate, is made dependent upon the other, in such cases, if the instrument cannot operate as to both estates by reason of defective execution, the courts are stronly inclined to reject the paper *in toto*, and nothing short of the strongest proof of design on the part of the deceased will induce the courts to admit the instrument to proof as to the personal estate alone." (Devecmon v. Devecmon, 1875; 43 Md., 335, 345.)

"The question of the competency of a testator to make a will involves the inquiry whether he was of sufficient mental soundness to change any previously existing purpose he may have formed if he should think proper to do so. The mere fact that a will is in the direction of a preconceived purpose should have no weight unless the testator was of sound and disposing mind at the time of executing the paper." Est. of Hoover, 19 D. C.; 495.)

"The test of testamentary capacity is whether, at the time of making the will, the testator was capable of making a valid deed or contract. (Md. Act. 1798, Ch. 101.) The incapacity alleged must exist at that time of making the will. Undue influence, to avoid a will must destroy free agency, But any degree of importunity or undue influence which deprives him of his free agency, and which is such as he is too weak to resist, and in effect renders the instru-

ment not his free and unconstrained act will invalidate the will." (Barbour v. Moore, 4 App.; C. 535.)

(1*h*) The secret devise to the church of which Stevenson, the attesting witness, was pastor, is void under the statutes in force in the District of Columbia, and the entire will is void *pro tanto* for that reason alone.

"One of the subscribers to the attestation of a will had an interest under it and held not to be a credible witness within the statute," (Holdfast v. Dowling, 1746; 2 Strange's Rep., 1253.)

"An estate in fee, upon the determination of a life estate was devised to the wife of A. B. A. B. was one of the attesting witnesses to the will. The testator died in 1779, and the wife of A. B. died in 1813 before the previous life estate was determined: Held, that A. B. was not a good attesting witness to this will" (Hatfield v. Thorp, 1822; 5 Barnewell & Ald. Rep., 589.)

"The statute of 25 George II, chapter 6, section 1, rendering null and void any bequest or devise of any real estate or beneficial interest thereia to a witness attesting the execution of the will, is in force in this District." (Elliott v. Brent, 1887; 6 Mackey, 17 D. C., 98.)

"Be it enacted by the King's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that if any person shall attest the execution of any will or codicil which shall be made after the twenty-fourth day of June, in the year of our Lord one thousand seven hundred and fifty two, to whom any ben-

eficial devise, legacy, estate, interest, gift or appointment of or affecting any real or personal estate, other than and except charges on lands, tenements or hereditaments for payment of any debt or debts, shall be thereby given or made, such devise, legacy, estate, interest, gift or appointment, shall, so far only as concerning such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will or codicil, within the intent of the said Act; notwithstanding such devise, legacy, estate, interest, gift or appointment mentioned in such will or codicil." Act 25 George II, Cap. 6 Sec. 1., see note in 3 Jarman on Wills (edition of Randolph snd Talcott), p. 776.

(2.) The trial court erred in holding the evidence adduced by caveators insufficient to entitle them to go to the jury. This evidence is set forth in the bill of exceptions. (Rec. 14-25):

> "In its opinion this court reviews the evidence offered by the plaintiff on the trial of the case in the court below; none being offered there by the defendants, and finds it sufficient to entitle the plaintiff to have the issue submitted to the jury; and as the court below directed the jury to find a verdict for the defendants, which was done, and a judgment was entered on the verdict, this court reverses the judgment and remands the cause, with directions to grant a new trial." Humiston v. Wood, (1887) 124 U. S., 12.

(2*a*) The testimony of seven doctors, men of the highest standing in the profession, produced by the caveators, substantially coincided on an issue of capacity that the decedent had no testamentary

capacity; at any rate, the testimony was sufficient for the consideration of the jury.

> "Where there is testimony in a cause conducing to prove that a will was a direct consequence of a delusion under which the testator labored; a delusion calculated to pervert his judgment with respect to the disposition of his estate, it is perfectly clear, that he could not be considered as possessing a testamentary capacity, although, upon other subjects, he may have been rational and sane." Delafield v. Parish, 25 N. Y., 54.

(2*b*) The total disherison of the heirs at law, without naming them, tended to show incapacity. (Statute 27 Henry VIII, Cap. 10. Brief p. 31.)

> "By the law of Pennsylvania, heirs must take, unless they are disinherited by express words or necessary implication." Allen v. Allen, (1855) 18 How., 385,392.

> "The mere intention to disinherit the heir cannot affect him, for he takes under the law and not under the will, and may claim contrary to the express intention of the testator." Philleo v. Holiday, (1859) 24 Tex., 38,42.

> "An explicit declaration in a will that the heir shall not inherit, is wholly ineffectual to defeat his right, unless there be a *valid* devise to some one else." Zimmerman v. Hafer, 81 Md., 347.

> "A verdict that testatrix was of unsound mind when she made a will disinheriting an only child, who was in straitened circumstances, will not be disturbed, where the evidence shows that after her husband's death she lived for the greater part of her life by herself, occasionally stay-

ing with friends, and at different times naming different persons, strangers and relatives, including her son, to whom she proposed to leave her property, and finally a few hours before death, while in a very exhausted condition, she made her will in favor of her nephew whose father had persistently and for a long time pressed her to do so." Gurley v. Park, 35 N. E., 279.

"A will disinheriting a daughter will be set aside where it appears that the will was made by the father under the influence of a specfic delusion, based upon no facts whatsoever." (Thomas v. Carter, 1895; 170 Pa., St., 272.)

"A will cannot be sustained which is the direct result of an insane delusion of the testator in regard to the person who is the object of his bounty, or in regard to his moral duty to make the will in favor of a particular individual, corporation or society." (Orchardson v. Cofield, 1897; 171, Ill., 14.)

"The heir at law takes the benefit not only of a general and total but of a particular and partial failure of disposition under the will." (Schouler on Wills, 2nd Ed., 545.

"Directions excluding the heir at law or next of kin from any share in the testator's property will, as a general rule, be taken to have been inserted only for the purpose of the dispositions made by the will, and will not exclude the heir at law or next of kin from taking *property undisposed of*." (Theobald on Wills, 2nd Ed., 610.)

(2*g*) The confidential relations subsisting between the devisor and devisee casts the burden of proof upon the latter to sustain the devise.

"Where a person makes a will in favor of his priest, or religious adviser, to the exclusion of the natural objects of the testator's bounty, the law presumes undue influence, and to sustain the will there should be some proof besides the making of it." Marx v. McGlynn, 1882: 88 N. Y., 357, 371.

"When a will offered for probate is in the handwriting of the person to be benefited by it, before the will can be admitted to probate, it must be satisfactorily established, that the testator knew its contents. If, in addition to the will being written by the beneficiary, other suspicious circumstances exist, such as extreme debility of the testator, and great confidence reposed by him in the writer, the demand of the law for proof of knowledge of the contents of the will, will be increased." Daniel v. Hill, 1875; 52 Ala., 431, 437.)

"Where the testimony disclosed a very weak testatrix, and a will written by a person in confidential relations, under which he takes the whole estate, it becomes essential for the proponent to show affirmatively that testatrix had full knowledge and consciousness of what she was doing. Smith's Est., 1893; 3 Pa. Dist. Rep., 247,

"Undue influence is such influence as causes the subject to act against his own preference or desire. The relation of clergyman and parishioner, as the books term it or perhaps more properly, of spiritual adviser and the subject of his ministrations, is of a confidential nature, and raises a presumption of undue influence on the part of the former in case of a contract between them. Or, stating it differently, where such spiritual adviser obtains a devise or grant or gift from a member of his flock, the burden

is upon him to show the entire good faith of the transaction." (Good *et al.* v. Zook *et al.*, 1901: 88 N. W. Rep., 376.)

"When, at the time of a given transaction, a fiduciary or confidential relation is shown to have existed between the parties, and the opportunity for the exercise of undue influence was present in the relations and circumstances of the parties, and the one in the superior position of being able to exercise the influence has actually procured a benefit to himself from the other, a court of equity will not allow the benefit to stand without clear and satisfactory proof of the entire fairness of the transaction. Held in the present case the grantee in the deed has failed to show that the transaction with his mother-in-law, to whom he stood in a confidential relation, by which he was benefited, was fair and just; and the deed ordered to be vacated. In a suit to annul a deed on the ground that the grantor was not mentally capable of making a valid deed or contract, held that the case was one in which the verdict of a jury on issues properly formulated and sent to a court of common law for trial, might well be taken for the information and guidance of a court of equity, and a decree dismissing the bill reversed, and the cause remanded that such proceedings might be had." Moran v. Sullivan et al, 12 App. C., 137.

"Held, upon a review of the evidence, that the testimony of the defendant was unworthy of credence, and that a decree vacating the deed to him, and also a deed of trust executed by him to secure a loan, must be affirmed." Slater v. Hamacher, 15 App. C., 558.

"There are a number of authorities which, when confidential relations are shown, apply the equitable doctrine of constructive fraud and

devolve the burden of proof upon those claiming under the will." Onus Probandi and Preparation for trial. Bailey, p. 403.

(2*d*) The last important point, suggested by the record, is whether the act of signing a deed and will successively, both affecting the same property, does not *itself* indicate absence of testamentary capacity. By quoting from the deposition of Stevenson (Rec. p. 21-24.) the caveators did not intend to accredit him as their witness as to the conversation said to have transpired between Leach and Stevenson. But caveators had no other way to get before the court the *fact* that a deed and a will were successively signed on the same day, touching the same property, and between the same parties. Caveators believe this alleged conversation, if it occurred, emanated from Stevenson, and not from Leach. That Stevenson only resorted to the expedient of making the will to supply the deficiencies of the deed, as he himself says (Rec. p. 22); without knowing the legal effect of the papers. In respect to this matter, what the court below says: (Rec. p. 37.)

"Moreover, if the deed in question was valid to convey the testator's property to the grantee named in it, it is not apparent how the appellants can be prejudiced by the admission of the will to probate. For, since the grantee in the deed and donee under the will are one and the same person, if the grantee has already good title under the deed, as against the appellants, certainly the appellants cannot be injured by such confirmation, if any, as the will may give to the previous grant. The fact that, by the Act of Congress, the adjudication on the will in the present proceeding is made a finality as to the validity of the will, cannot have the effect

of substituting that will for the prior deed if that prior deed was a valid operative instrument; and if it was not a valid operative instrument, of course, the contention of the appellants wholly fails."

—ignores entirely, the consideration that there may be an injury to the *law*, by violation of the Act of Congress; independently of the injury the plaintiffs in error might have suffered or even if they suffered none at all. The Act of Congress gives the orphans' court judicial power to admit to probate *testamentary instruments*. The orphans' court does not, like a recorder of deeds, have to admit to record anything that satisfies the forms of law. If the court below is right, a number of courts, that have passed on similar questions, as appears by subjoined extracts, are radically and fundamentally wrong. It is eminently appropriate therefore that the court of last resort should speak finally and authoritatively on the subject. Moreover the view in this regard presented in the decision of the court below is fallacious, and unjust to the caveators, because they do not know and cannot know, (until the deed is offered as a source of title which has not been done, as yet) "*whether the grantee has already a good title under the deed*, as against the appellants." This is to be assumed only for the purposes of this case; and upon inspection of the deed itself, which is unrecorded and held in the custody of the defendants in error. Plaintiffs in error do not doubt that if the alleged will should finally be denied probate, the defendants in error would then seek to assert title under the deed.

If the deed in question here is good as between the

parties thereto, under 1 Devlin on Deeds 599 (*infra*) though not good as to third persons, yet it should be held that the grantor so altered the seisin of the property as to make the alleged will inoperative.

> "The rule which obtains in most of the states is that as between the parties, no acknowledgement is necessary. The provisions relating to the acknowledgement of deeds are made for the protection and security of creditors and purchasers. But so far as the grantor is concerned, the title vested in him passes by the deed to the grantee as completely as it would if the conveyance had been acknowledged and recorded. The want of the acknowledgement, or the proof which may authorize admission of the deed to record, does not invalidate the deed as between the grantor and grantee ; and it is good as to all persons who are charged with such notice. The ackowledgement and recording of the deed are provisions which the law makes for the security of creditors and purchasers. They are not essential to the validity of the deed as to the grantor. An unacknowledged deed passes title equally with one duly acknowledged and certified Acknowledgement has reference simply to the proof of execution, not to the force of the instrument." 1 Devlin on Deeds, (2nd ed.) §465 p., 599.

It is submitted that the authorities pertinent under this head are divisible into six classes :

The first class is : where the same instrument is capable of construction either as a deed or a will ; as illustrated by—

> "Whether a paper be a will or a deed depends upon its effect and operation, to be determined by its own terms." (Daniel v. Veal, 1861 ; 32 Ga., 589, 591.

The second class is: where the same instrument is capable of construction, either as a deed or a will; the law will presume it a deed if the transaction is *inter vivos*, taking effect *in praesenti;* if it does not take effect until after the death of the testator, it will be deemed a will; as illustrated by—

> "The circumstances in evidence respecting the deed make it probable that he thought he was executing the deed. These circumstances taken in connection with the advanced age and the then situation of the deceased, and his death shortly after, are conclusive to show that the instrument exhibited ought not to be established as his will." (Swett v. Boardman, 1804; 1 Mass., 257, 262.)

At any rate, a doubt as to the delivery of a paper is to be resolved by a jury; as illustrated:

> "It is proper to submit to a jury whether a deed had been delivered as the deed of the party." (Wadsworth v. Warren, 12 Wall., 307.)

The third class is: where the deed is executed after the will, giving a total or partial revocatory effect; as is illustrated by—

> "A convey ance of property previously devised works a revocation of such devise, *and this, where the conveyance is to the devisee.*" (Coulson v. Holmes, 1878; 5 Sawyer, 279.)

> "By his will executed in 1872, testator devised his real estate equally to his wife and his three children in fee. Having been annoyed, with law suits by his son-in-law he executed a deed in 1887, conveying his real estate to a trustee in fee for the sole benefit of his wife.

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Held, the deed was a revocation of the will. The deed having been delivered in the grantor's lifetime was valid, though not recorded until after his death. As between the beneficiaries under the will, *the will was inoperative as to such property as was parted with during the life of the testator.*" Collup v. Smith, 1892; 89 Va., 258, 264,

The fourth class is: where the deed is executed before the will, making the latter inoperative as illustrated by—

"The Court concurs with the presiding chancellor that the will of Edward Blake could not not control the dispositions of the *deed previously executed.* (Purcell v. Purcell, Riley Eq. Rep., S. C., 282, 284.)

"If the deed had been sustained Zimmerman would have held under it, and not under the will. *Clearly he could not have held the same estate under both the deed and the will at the same time.* If the deed had prevailed he then have held under it, and it only, because it would then have conveyed the grantor's entire interest to the grantee, being ostensibly a deed in fee simple. If it effectually conveyed a fee then it would have divested the grantor's whole interest in the property, and having been executed prior to the will there would have been *no estate left in the grantor for the will to operate upon.*" (Zimmerman v. Hafer, 1895; 23 W. *L.* R., 767, 568; 81 Md., 347.)

The fifth class: where the instrument is imperfect and inoperative either as a deed or a will; in such cases the courts prefer intestacy, rather than that the law be strained or violated; as illustrated by.

"An instrument may fail of effect as a testamentary paper, and also be ineffectual as a transaction *inter vivos*." Cover v. Stem, (1887) 67 Md., 449.

The sixth class: where doubt exists as to the order of execution, as illustrated by citation.

"Two inconsistent papers being signed the same day, the court might receive evidence which should operate." Est. of Nosworthy, (1865) 11 The Jurist, (pt. 1 N. S.,) 570.

It is submitted that the case at bar is clearly comprehended within the fourth class, and that the decisions cited thereunder are on cases exactly parallel to that at bar and directly antagonistic to the reasoning employed in the opinion of the court below, in the quotation therefrom (Brief p. 45.) The decision in 89 Va., 264, cited under the third class, though on a converse state of facts, is based on the same reasoning employed in Riley Eq. R., (S. C.) 289 and 87 Md., 347, cited under the fourth class. So three different state courts agree upon an opposite conclusion from that arrived at by the court below, on substantially the same state of facts, But the court below lays stress upon the identity of the grantee in the deed with the donee in the will. But in the cases in 81 Md., 347 and 5th Sawyer, 279 (supra,) this identity of personage was held not to affect the legal aspect of the question whether title was divested from the settlor by the deed or by the will.

It must therefore have been manifest to the decedent, if he had testamentary capacity at the time of the execution of the will, that he was donating by the will what *he had already granted* by the deed.

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In that same predicament, Isaac on his death-bed *remembered* that he could not give to Esau what he *had already given* to Jacob, when he said: "Thy brother came with subtilty, and *hath taken away thy blessing*." Genesis 27, verse 35.

So if decedent was possessed of sound memory at that time he would not have attempted to make a will *after* a deed, both affecting the same property. The fact that he did so was a *prima facie* argument against his capacity to make the alleged will; and that one circumstance alone, unaided by the others in the record, was sufficient, as plaintiffs in error submit, to entitle them to go to the jury on the issue of testamentary capacity, and made it reversable error in the trial court to direct a verdict. (Humiston v. Wood, 124 U. S., 12 Supra.)

J. H. ADRIAANS.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 145.

GUSTAVUS LEACH ET AL.

vs.

CHARLES R. BURR ET AL.

PETITION FOR REHEARING.

Now come the plaintiffs in error in the above-entitled cause and respectfully petition this honorable court to allow them a rehearing in said cause upon the following grounds, viz:

First. For that whereas it appears in and by the record that the sole and only issues framed in this cause and submitted to the jury (Rec. pp. 8 and 9) were: (1) Whether the decedent was "of sound mind and capable." (2) Was the paper offered for probate "procured by threats, menaces, and duress." (3) Was the same "procured by the fraud of."

That these issues and none other were brought to trial by and before the jury on the 5th and 6th of March, 1900 (Rec. p. 11), on which latter day, under the direction of the trial judge, the jury returned verdict in favor of the proponents of the alleged will.

That no issue was framed or presented to the jury whether the paper writing propounded as a will was executed by the

decedent, Ezra W. Leach, and yet, that ten days thereafter, on the 17th of March (vid. Rec. p. 13), the judge aforesaid, without more, and especially without taking that "formal proof of its proper execution," indispensably required by section 4 of the act of June 8, 1898, then in force, or the evidence of any subscribing witness whatever, assumed to decree and did order the paper "admitted to probate and record as duly executed to pass real estate," in doing which, it is respectfully submitted, the court then and there transcended its jurisdiction and its act was and is void, which point of jurisdiction is always and in any case open to the judgment of this final tribunal but has not been touched upon in its decision.

Second. For that, by unquestioned evidence (vid. Rec. p. 21, lines 1 to 8 incl., of last paragraph; and lines 9 to 15, top of p. 23) it is established that by and through the alleged will it was the intention and purpose of the decedent to evade the letter, spirit, the long-honored and established policy of our law declaring that no devise or bequest—

> "to any minister," etc., "or to any religious sect, order, or denomination, or to or for the support, use, or benefit of, *or in trust for* any minister, public teacher, or preacher of the gospel as such, or any religious sect, order, or denomination, shall be valid unless the same shall be made at least one calendar month before the death of the testator."

Third. It is respectfully submitted that in considering the question of the competency of said Leach at the time of signing the paper propounded for probate to recall the natural ties of affection and obligation to provide for his kindred, this honorable court may have been influenced by the erroneous conception that the record failed "to show that he visited them or they him, or that they ever corresponded," while in fact it shows that he visited in Boston in 1895, staying two weeks with Mr. Cushing, his maternal relative

(v. top of p. 18, Rec.), that he then visited at least the caveator, Wm. F. Leach (v. Rec. p. 17), residing at Weymouth, Mass., 12 miles out from Boston. These facts are further supported by the testimony of Rawson (Rec. p. 15) and Fairbanks (Rec. p. 16), both disinterested witnesses.

And in support of such motion said plaintiffs in error respectfully submit the accompanying brief of authorities, etc.

The undersigned counsel for the plaintiffs in error in the cause hereinbefore entitled hereby certify that in their opinion the grounds set forth in the foregoing petition for rehearing are valid and sufficient to justify and require such rehearing.

WM. A. MELOY,
Counsel for Plaintiffs in Error.

I concur with the foregoing certificate.

GEO. F. HOAR.

BRIEF

to accompany the foregoing petition for rehearing in Leach et al. *vs.* Burr et al. No. 145 of October term, 1902.

I.

The silence of the opinion of the court touching the failure of the proponents to make the formal proof of execution in conformity with the statute strongly indicates that this point was not sufficiently pressed home to the mind of the court as to secure the attention it merits. And yet by the terms of the act of June 8, 1898, sec. 4 (vid. D. C. code, sec. 135), it is one of clear jurisdictional limitation, a proviso to the Congressional grant to the probate court of a new power never before given.

It was so held and insisted upon by the Court of Appeals of the District of Columbia in the more recent case of the Savings and Trust Co. *vs.* Heiberger, reported in Wash. Law Rep. of May 8, 1902, p. 310, wherein that court said such—

> "formal proof can not be dispensed with by the admission of the caveator *or the consent of all concerned.*"

The language of the statute is clear, explicit, comprehensive, and peremptory in its negation.

> "*Provided,* That *in no case* shall *any* will or testament be admitted to probate and record save upon formal proof of its proper execution."

And what is meant by this "proper execution?"

The statutory provision as it stood in December, 1896, when Ezra W. Leach died, and in March, 1900, when this alleged will was admitted to probate, was in the following words of the Maryland act of 1798, ch. 101, sec. 4, to wit:

> "All devises and bequests of any lands or tenements, devisable by law, shall be in writing and signed by the party so devising the same, or by some other person in his presence and by his express direction, and shall be attested and subscribed in the presence of the said devisor by three or four *credible* witnesses, or else *they shall be utterly void* and of none effect."

And almost in totidem verbis this wise provision of testamentary law was stamped with approval and perpetuated by Congress in section 1626 of the District Code.

The courts have jealously guarded and enforced this provision as a necessary protection of heirs at law, saving their natural rights against the insidious acts of legacy hunters in the last hours of decaying nature. It secures absolutely to them the opportunity to be confronted with the witnesses, not only by rigid cross examination to make clear the fact, *vel non,* that their ancestor was at the time of sound and disposing mind and uninfluenced, etc., the points covered

by the verdict in this case, but also that the paper was signed by him or was signed by another in his presence by his express direction, and that it was attested in the presence of said devisor by the requisite number of witnesses, and not least of these essential things, that such witnesses were *credible.*

And will any one say that even this last is a merely perfunctory, indifferent thing? Shall those be regarded as credible witnesses who have both recently served out their term in prison, convicted and condemned for perjury, or even for horse stealing—or notorious for procuring wills to be made fraudulently—or who may be found to be the secret beneficiaries of the will procured?

No! We submit that this is a valuable right, the provision of the law a vital one, and wisely made jurisdictional, which secures to a man's heirs the opportunity, if the law be duly administered, to ascertain and advise the court whether the witnesses are credible, ought to be believed.

Had the issue of proper legal execution of this will been framed and so laid before the jury they would have been entitled to pass upon the credibility of the subscribing witnesses, even from their appearance and conduct on the stand, and said to the blear-eyed, Bardalphion nose, we do not believe. But the jury had not this opportunity given them. The court had the right and the duty but did not exercise them, and so the heirs have not had in this regard their day in court, without which the admission to probate is non-jurisdictional and *void.*

Second. The facts of the secret trusts to avoid and thwart the policy of our law in respect to devisees for the benefit of religious bodies and ministers is not only evidenced by the record without question, but by the papers laid before the court on our motion for new parties to be added, is shown to be in process of being carried out, and some of the property already been deeded to a religious society.

As to this feature of the case in foro, are not the legal

heirs of a man entitled to as much consideration as the creditors of a man who by will and deed gives his property to another, thereby hindering or delaying them in the enjoyment of their remedies and their interests in such property?

The courts have clearly and repeatedly said that creditors had the right to have such conveyances declared void even before the statute of Elizabeth.

Since that statute they have said that though such conveyance shall have been made in all innocency of heart, bona fide for a purpose proper and good in itself, yet it shall be conclusively held fraudulent and void for reasons of the general policy of the law.

And when, as in the case at bar, the paper propounded as a will is admitted to have been designed to carry out a secret trust in violation of a settled maxim of our civil and political policy, shall it be passed over and allowed against those declared by the law of all ages and all civilized nations the equitable and legal owners of their ancestors' property?

WILLIAM A. MELOY,
GEORGE F. HOAR,
Counsel for Plaintiffs in Error.

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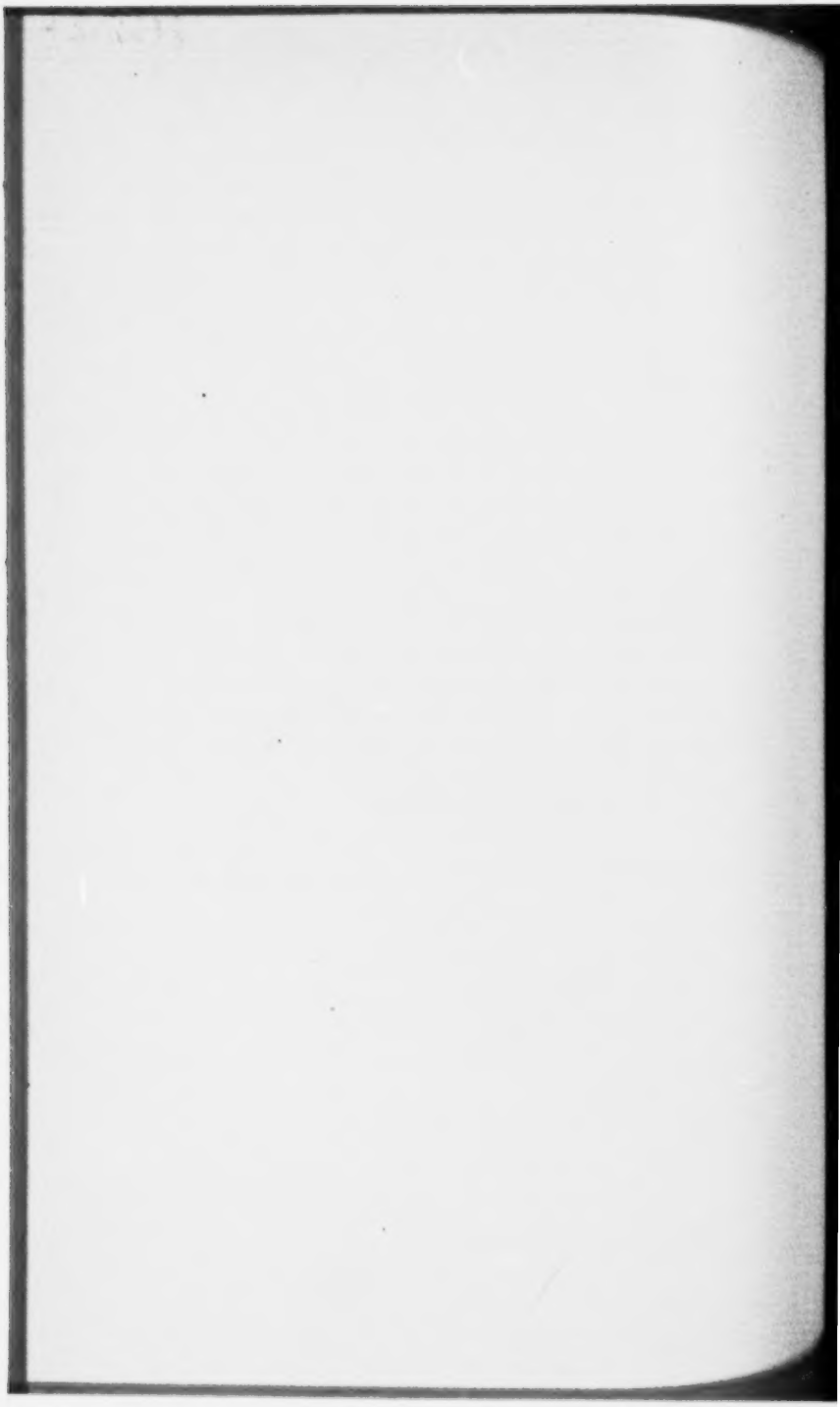

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 145.

GUSTAVUS LEACH, ET AL., PLAINTIFFS IN ERROR,

vs.

CHARLES R. BURR, EXECUTOR, ET AL., DEFENDANTS IN ERROR.

Brief in Opposition to Motion to Add Parties.

J. J. DARLINGTON,
Attorney for Defendants in Error.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 145.

GUSTAVUS LEACH, ET AL., PLAINTIFFS IN ERROR,

vs.

CHARLES R. BURR, EXECUTOR, ET AL., DEFENDANTS IN ERROR.

Brief in Opposition to Motion to Add Parties.

This motion was made and submitted to the court without notice to the defendants in error.

Its only conceivable purposes are annoyance and delay, it being elementary that grantees of the devisee under a contested will, as in all other cases of conveyances *pendente lite*, take subject to the suit, and are not necessary parties.

The authorities cited are not in conflict with this rule. The withholding of the motion until the cause was on the call for hearing in this court is an additional reason why it should be dismissed.

Respectfully submitted.

J. J. DARLINGTON,
Attorney for Defendants in Error.

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Supreme Court, U.S.
FILED
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JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

No. 145.

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GUSTAVUS LEACH, ET AL.

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BRIEF FOR DEFENDANTS IN ERROR.

R. B. BEHREND,
J. J. DARLINGTON,
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GUSTAVUS LEACH ET AL.

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BRIEF FOR DEFENDANTS IN ERROR.

This cause presents an appeal by the plaintiffs in error, caveators, from a decree of the Orphan's Court admitting to probate and record the will of the late Ezra W. Leach.

Mr. Leach died on the 21st day of December, 1896, leaving a last will and testament executed on that day, a few hours before his death. By this instrument, set out on page 20 of the record, he gave all his property to the defendant in error Samuel H. Lucas, and appointed the defendant in error Charles R. Burr, executor. The testator had resided in the District of Columbia since the close of the Civil War,

was childless and unmarried, had been a Government clerk for some years, and had afterwards conducted a florist's establishment, residing in Anacostia and living alone with his devisee, Samuel H. Lucas. He had taken the latter when a small, homeless, colored boy, had reared and educated him, had associated him with himself in his flower business, and, during the latter years of his life, had left the business wholly to Lucas, to whom he was much attached.

His estate consisted of three parcels of real property in Anacostia, worth in the aggregate about eight thousand dollars ($8,000), one of which parcels was a dwelling house adjacent to the church of which he was a member, and which he had long intended to give to the church for use as parsonage, the principal part of the remaining real estate being the property used in his business as a florist. His personal estate was inconsiderable, aggregating something less than three hundred dollars.

On December 21st, 1896, after an illness of about eight days, finding himself unexpectedly at the point of death, the testator sent for his pastor, Rev. Hugh T. Stevenson, stated that he had not anticipated that the end of his life was so near, that he had desired to perform some things which he had neglected, that he had wished to give a parsonage to the church, but could not now do so in view of the law of Maryland in force in the District of Columbia which rendered void gifts to religious uses unless made for a prescribed period before death, and that he wished Mr. Stevenson to prepare a deed conveying all the property to Lucas, at the same time telling Lucas what he would like to have done in reference to a parsonage for the church. Mr. Stevenson prepared such a deed, to the best of his ability, and the testator signed and acknowledged it before Dr. A. M. Green, a notary public; but Mr. Stevenson, who had never before prepared a deed, expressed some fear whether it was in proper form and suggested that a will might be better. The testator thereupon directed Mr. Green to pre-

pare a will, who accordingly wrote the paper in controversy, which the testator signed in the presence of four witnesses, one of them being his medical attendant. There was no delivery of the deed, it remaining in the possession of the executor, and, indeed, not appearing to have been fully completed. Record, p. 22. After the death of the testator, the will having been offered for probate, a caveat was filed in the names of certain persons purporting to be his cousins, heirs and next of kin in varying degrees, under which caveat issues were made up and tried in March, 1899, resulting in the direction of a verdict by the Court in favor of the will, upon the testimony offered by the caveators themselves.

The above proceedings had been instituted before the Wills Act of June 8, 1898, and were accompanied by an ejectment suit, which, under stipulation, was to have been tried with the issues; but, when reached for trial, the ejectment suit was discontinued by the plaintiffs, rendering the jury trial of slight practical effect; and thereupon, under Section 8 of the Wills Act, which had been passed in the meantime, and which provided that "any person interested under any will hertofore filed in said Court may offer the same for probate as a will of real estate," the executor filed a second petition, a second caveat was interposed, and, on November 2nd, 1899, the three issues printed on pages 4 and 5 of the Record were ordered for trial, the first presenting the question of the testator's mental capacity, the second that of undue influence, and the third that of fraud.

At the trial of these issues, the presiding justice again ordered a verdict for the will, as to each of them, upon the testimony offered on behalf of the caveators, and the only exception presented by the Record is to this action of the Court. Record, p. 25.

POINTS AND AUTHORITIES.

This brief is written under the disadvantage of having neither the opposing brief, nor any statement of errors

which are to be relied upon in this Court. As shown by the opinion of the Court of Appeals, at page 32 of the Record, the assignments of error in that Court were complicated and confused, but amounted in effect to the four following:

1. That the trial court below was without authority or jurisdiction to admit to probate and record, because the procedure required by Section 4 of the Act of June 8, 1898, had not been followed.

2. That the publication as to the non-resident parties was not in accordance with the provisions of the Act.

3. That it was error to direct the jury to render a verdict for the caveatees, and

4. That the evidence showed disposition by deed of the testator's property, leaving nothing upon which the will could operate.

I.

The provisions of Section 4 of the Act of June 8, 1898, require that the heirs-at-law or next of kin of the testator be summoned to appear before the justice holding the Probate Court, ten days before the will is presented for probate and record; that, should any of the parties in interest be returned "not to be found," then not less than thirty days' notice of the application for probate shall be published, that due proof of the publication shall be made, etc., etc.; and the first of the above assignments of error was based upon the fact that the Record does not show these several preliminary proceedings.

Section 2 of Rule V of the Court of Appeals of the District of Columbia, following a series of provisions for reducing the volume and expense of records and transcripts on appeals, provides for a stipulation between the parties to an appeal as to the parts of the original proceedings which shall constitute the transcript. Following the provisions of this rule, the counsel for the plaintiffs in error designated

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the parts of the Record relied upon on their behalf as the basis of their appeal, which designation was thereupon assented to by the attorneys for caveatees. Record, page 26.

As pointed out above, the only exception reserved in the case was to the action of the Court in directing a verdict for the caveatees upon the three issues presented, namely, those as to mental capacity, undue influence and fraud. Nowhere in the Record had there been the semblance of objection to the sufficiency of all those former preliminary proceedingsto which this first assignment of error relates. The only "appeal allowed herein," referred to in the stipulation at page 26 of the Record, was that set forth, at page 14, from the order admitting the will to probate and record; and the only objection to this order was the motion in opposition by the plaintiffs in error at page 13 of the Record, based upon the alleged execution and delivery of a deed conveying the testator's property prior to the execution of the will.

Even if every objection on the part of the caveatees, at any stage of the proceedings, could have been considered as available for consideration in the Appellate Court, notwithstanding the absence of either exception or appeal as to any of them other than the two above noted, those objections would have been the four following, and no others, namely:

1. That the Wills Act of June 8, 1898, does not apply to the case of wills offered for probate prior to its passage. Record, p. 5.

2. That the provisions of the Statute in regard to publishing notice of the date assigned for the trial had not been complied with. Record, p. 8.

3. That the testator had by deed conveyed his property prior to the execution of his will, and therefore did not die seized of it. Record, p. 13.

4. That the Court erred in holding the evidence insufficient for submission to the jury upon the questions of men-

tal incapacity, undue influence and fraud. Record, p. 25.

It was in a case presenting at most these questions, and no others, that the counsel for the appellees was asked to assent by stipulation to the parts of the Record to be included in the transcript for the hearing of the appeal in the Appellate Court. The stipulation shows that the transcript is of "part of the Record" only, being simply that "designated for transmission to the Court of Appeals of the District of Columbia as a basis of the appeal allowed herein." At the hearing in the Court of Appeals, that tribunal permitted the original papers constituting the complete Record to be brought up from the court below for its inspection, when, as is stated in its opinion at page 33 of the Record, it was found that all the proceedings required by Section 4 of the Wills Act had been regularly taken.

To procure by stipulation, under a rule designed to spare the parties unneccessary expense, the omission of parts of the Record as being unnecessary to consideration of the appeal, and then, in the Appellate Court, to contend that the judgment appealed from should be reversed because the stipulated parts of the Record do not show certain necessary preliminary proceedings which had actually taken place, and which would have appeared of record in the Appellate Court but for their ommission under the stipulation, is a practice which the Court of Appeals very properly held could not be sanctioned.

Apart from the above objection, a proposition that the plaintiffs in error, after appearing in the court below, interposing a caveat to the will offered, causing issues to be made up for trial by a jury, and occupying the time of the Court and jury for days in the attempt to sustain the contentions raised by their caveat, may in the Appellate Court, obviate the effect of their defeat by claiming then, for the first time, that the transcript of the parts of the Record which they had procured by stipulation to be transmitted to that Court does not contain the evidence that they had

been duly summoned to appear, can scarcely be seriously contended. As is apparent from the Record, no such question was raised in the trial court.

"In no case will this Court decide any point or question that was not fully presented for decision by the Court below." Rule 5, Court of Appeals, D. C., Sec. 3.

It may be that this assignment of error will not be relied upon in this Court; but, as stated, this brief is prepared at the last moment, after ineffectual effort to obtain a copy of the opposing brief, or of the assignments of error which it will present.

II.

Section 6 of the Wills Act provides that, where the required notice of the date of trial shall be returned "not to be found" as to any of the parties in interest, the court shall assign a new day for trial, and shall order publication at least twice a week for a period of not less than four weeks, of a copy of the issues and notification of trial in some newspaper of general circulation in the District of Columbia. The affidavit of J. Whitt Herron (Record page 9) shows that this notice was published in the Star on January 26th and 30th, and on February 2nd, 6th, 9th 13th, 16th and 20th, 1900, the first advertisement appearing on Friday, January 26th, and the last on Tuesday, February 20th, and the publication being twice a week for four weeks in the ordinary acceptance of the term. The objection under the second assignment of error is that a "week," in the sense of the statute, means from Sunday to Saturday, both inclusive, and that the advertisement should have appeared twice between Sunday and Saturday for four successive weeks, instead of twice in four successive periods of seven days, not necessarily commencing with Sunday, the authority cited in support of this proposition being Ronkendorff *vs.* Taylor, 4 Pet., 349, 361.

That the word "week" in the Act is not justly subject to

the techincal construction thus sought to be affixed to it, and that Ronkendorff *vs.* Taylor is not authority for such a claim, is pointed out in the opinion of the Court of Appeals, at pages 33-4 of the record.

In addition, the very language of the Wills Act negatives the claim. It is that the court shall order publication, at least twice a week, not "*for four weeks*," but for "*a period of not less* than four weeks." The publication proven in this case cannot be claimed to have been for "a period less than four weeks." Had the first advertisement appeared on Tuesday January 30th, instead of on Friday, January 26th, and had its last appearance been on Friday, February 23d, instead of on Tuesday, February 20th, thus conforming literally to the construction urged, the publication would have been for a day less than the period which it actually covered.

In other words, the contention is not only one without merit, but is in conflict with even the letter of the statute, as well as with its substantial object and meaning. See Early *vs* Homans, 16 How., 616-17.

If anything further were necessary, it will be observed that the objection in question is made by certain of the caveators, who appeared, generally, by their counsel, that these caveators, with the others, accepted without objection the position of plaintiffs by the court's order at the trial (Record pp. 10, 14 and 15), and that they thereupon proceeded with the trial of the case to verdict and judgment. Having appeared generally, having accepted without objection the position of plaintiffs in the cause at the trial of the issues, and having proceeded without objection on this score to trial, verdict and judgment, the objection in question cannot be available at this stage of the case, even if otherwise possessed of merit.

III.

Under the third assignment of error, it was argued prin-

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cipally below that, under the Wills Act, the court is without power in any case to direct a verdict. No authority for this proposition was cited, nor, it is believed, exists. The contrary has long been the practice both in this jurisdiction, in Maryland and elsewhere. Manogue *vs.* Herrell, 13 D. C. App., 455; Raub *vs.* Carpenter, 17 D. C. App., p. 519; Wagner *vs.* Zeigler, 44 Ohio State, 59.

In addition, as is pointed out in the opinion of the Court of Appeals at page 35 of the Record, the Wills Act, in terms, provides that the trial justice shall have "the same power to set aside the verdict and grant a new trial that is possessed and exercised by the Supreme Court of the District of Columbia in cases tried with a jury according to the course of the common law, and as to such trials shall have *all other* powers now vested by law in the Supreme Court of the District of Columbia holding a special term as a circuit court." The power to direct a verdict for the defendant in cases where there is no evidence upon which an adverse verdict can be rendered, has always been among the powers vested by law in the Circuit Court.

This brings us to the only question really presented by the record, namely, whether, upon the testimony adduced on behalf of the caveators, there was any evidence to go to the jury upon the question of the testator's sanity, or of the procurement of the will by either undue influence or fraud.

No evidence in support of the second and third of these issues was attempted, even. The burden as to each of them was upon the caveators, who offered no testimony whatsoever tending, however remotely, to prove that the execution of the paper by the testator was "procured by threats, menaces and duress exercised over him by Samuel H. Lucas or any other person or persons," or that it was "procured by the fraud of Samuel H. Lucas, or any other person or persons."

The sole inquiry, therefore, is whether there was any evidence sufficient for submission to the jury, tending to

show that the testator was at the time of the execution of the will of unsound mind, incapable of executing a valid deed or contract.

Upon the question of the actual mental condition of the testator, the witnesses offered were Warren W. Rawson, George E. Fairbanks, Lois C. Cushing, and Rev. Hugh T. Stevenson, the latter being one of the attesting witnesses.

Mr. Rawson, a florist of Boston, saw the testator but once, in July, 189[illegible], at which time the testator called upon him to inquire about the use of electricity in connection with the growth of plants, Rawson being the pioneer in that use. He testified that he thought testator "was a very peculiar man," because he asked "peculiar questions and still would repeat questions that he had formerly asked;" and that he observed nothing else upon which he based that opinion. Record, p. 15. On cross-examination, he added that the testator appeared to believe that witness had some trade secret in relation to the effect of electric heating upon the growth of flowers, as many other persons did, which he was concealing, and that the questions which were repeated were in relation to that subject; and that he could not bring to mind any facts showing peculiarities upon the testator's part. Record, p. 16.

Mr. Fairbanks testified that he worked in the same shop with testator from 1850 to 1862; that he always had "eccentric ways about him," and, upon being interrogated as to what these eccentric ways consisted of, answered: "Well, he was pretty set in his disposition against anything that did not exactly suit." The instances given of this eccentricity were that, on one occasion when a series of religious meetings were being held in the church to which testator belonged, a man who was in the habit of ridiculing everything of a religious nature, and who had brought with him a gang of young men pretending to be interested, but really for the purpose of making sport, undertook to participate in the meetings, and that the testator "got right up in meeting

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and told him to sit down;" and that at another time he got into a difficulty with the pastor of the church and was considerably excited—these incidents occuring prior to the Civil War, the witness further testifying that he could not recall any facts nearer to the time of testator's death than the two mentioned. Record, pp. 16-17. He adds that he never at any time saw any lack of mental ability upon the part of the testator to make contracts or to do any acts which he desired, and that he never doubted his mental and business ability to make contracts. Record, p. 17.

Mrs. Cushing, the testator's cousin, also testified that she had known testator from her earliest recollection, that she never saw any change in him up to the time of his death, that she never observed anything about him other than normal in so far as his mental condition was concerned, and that she never heard his mental condition questioned until after his death, when this question about his property arose, although she used to see a great deal of him. Record, pp. 18-19.

Mr. Stevenson, the testator's pastor, after stating the facts already set forth attending the execution of the will, testified that he was one of the attesting witnesses, that the testator was of sound mind and capable of making a valid deed or contract at the time of its execution, that he had been witness's chief adviser and counsellor in all church matters, that he was one of the deacons of the church, a member of the board of trustees, a member of the finance committee, treasurer of the board of deacons, and an incumbent of other offices of the church down to the time of his death, and that he was also a member of the executive committee of the Baptist denomination in the District of Columbia; that he was a man of excellent ability, of considerable intelligence, and well competent to transact any business up to the very end of his life, and that witness observed no change in his business capacity, memory and ability up to the time of his death.

The only other testimony offered to show mental incapacity was that of sundry physicians to the effect that a man dying of *acute* pneumonia is usually in a comatose condition for some hours before his decease, and that a man dying of that disease would not be capable of making a valid will, deed or contract within three or four hours of his death. One of these witnesses, Dr. Richardson, who was the only one interrogated upon that point, testified, however, that this unconsciousness preceeding death, found in cases of acute pneumonia, was not characteristic of death from bronchial pneumonia, which fact was not disputed by any other witness; and that, in his opinion, upon the facts attending the execution of the will as testified to by Mr. Stevenson, the testator was not laboring under any mental disability to make a valid deed or contract. Record, p. 20.

The only evidence in the case in the nature of an attempt to show the cause of the testator's death, and to which the expert testimony is supposed to relate, was the death certificate from the Health Department printed at page 19 of the Record, in which the cause of death is stated, not as "acute," but as "bronco-pneumonia." This certificate, required only by a police regulation of the District of Columbia as a prerequisite to a burial permit, was not a public record in such sense as to make it evidence between private parties of any facts recited therein. Buffalo Loan Company *vs.* Knights Templar *et al*, 126 N.Y., 450, 458; Sovereign Camp of Woodmen *vs.* Grandon, 89 N. W. Rep., 448, 451; Kerr *vs.* Met. Ry. Co., 57 N.Y. Supp., 794; Drier *vs.* Continental Ins. Co., 24 Fed. Rep., 670, 672; 2 Phil. Ev., 280, 287, 290.

If, however, the rule were otherwise, the death certificate showed death, not from acute, but from bronco-pneumonia, which form of the disease, as shown by the above noted and undisputed testimony in the case, is unaccompanied by the unconcious or comatose conditions testified to as preceding death from acute pneumonia.

That the cavators not only failed to produce the slightest

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evidence to go to the jury tending to support the allegation of mental incompetency or incapacity on the part of the testator, but that they proceeded to prove, conclusively, the very reverse of their case, demonstrating both by the direct testimony and by that of the expert medical witnesses the validity of the will, does not admit of dispute, upon the record in the case.

IV.

The fourth assignment of error rests upon the proposition that, if a testator originally contemplates disposing of his property by a deed, which is accordingly prepared and signed by him, but the execution of which is not completed and which is never delivered because, pending its completion and delivery, he determines to dispose of his property by will instead, the will executed under such circumstances is legally incapable of admission to probate and record.

That an undelivered deed is without any effect is elementary.

The deed itself, at the time of the trial, was in the possession of the testator's executor, but was not called for or offered in evidence for any purpose. And, as is pointed out in the opinion of the Court of Appeals at page 37 of the Record, if it were valid, effective and sufficient to convey to the defendant in error Lucas all the testator's property as claimed, it is not apparent how the plaintiffs in error could be prejudiced by its admission to probate. "If the grantee already has good title under the deed as against the appellants, certainly the appellants cannot be injured by such confirmation, if any, as the will may give to the previous grant."

Respectfully submitted,

R. B. BEHREND,
J. J. DARLINGTON,
For Defendants in Error.

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OCTOBER TERM, 1902.

GUSTAVUS LEACH, ET AL

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CHARLES R. BURR, EXECUTOR, ET AL.

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

R. B. BEHREND,
J. J. DARLINGTON,
Attorneys for Defendants in Error.

In the Supreme Court of the United States.

NO. 145.

OCTOBER TERM, 1902.

GUSTAVUS LEACH ET AL.

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CHARLES R. BURR, EXECUTOR, ET AL.

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

At the hearing of this case, Sec. 1625 of the Code of Laws for the District of Columbia, providing that no will shall be good or effectual unless the person making the same be of sound and disposing mind and capable of executing a valid deed or contract, was referred to as bearing upon the question of the burden of proof, where the issue is as to the testamentary capacity of a testator. This provision of the Code is identical in phraseology with the Maryland Act of 1798, Ch. 101, cl. III. Sec. 3, in force in the District of Columbia since its creation, and which provides:

"No will, testament or codicil shall be good and effectual for any purpose whatever, unless the person making the same be, at the time of executing or acknowledging it as hereafter directed, of sound and disposing mind, and capable of executing a valid deed or contract."

Under this provision, the courts of Maryland have always held that the sanity of a testator is to be presumed until the contrary is shown, and that the burden of proof is upon the caveators. Higgins *vs.* Carlton, 28 Md. 115, 143. And in Tyson *vs.* Tyson, 37 Md., 567, 582, the action of the trial court was sustained in directing a verdict in favor of the will, upon issues identical with those in the case at bar, on the ground that the evidence, although much more nearly approaching a *prima facie* case than the evidence in the present instance, was not sufficient "to warrant the jury, in the exercise of a reasonable intelligence, to find any issues in favor of the plaintiffs."

In the District of Columbia, also, the like rule as to the burden of proof was declared as far back as the year 1807 (Dunlap *vs.* Peter, 1 Cr. C. C., 403), and has ever since been followed.

In the present case, however, the question as to the burden of proof is probably not material, since the caveators' witnesses Fairbanks, Cushing and Stevenson all testified that the testator was of sound mind, and no evidence to the contrary was given.

Respectfully submitted,

R. B. BEHREND,
J. J. DARLINGTON,
Attorneys for Defendants in Error.

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Supreme Court of the United States.

No. 145.—October Term, 1902.

Gustavus Leach, William F. Leach, Chester H. Shaw, et al., Plaintiffs in Error, vs. Charles R. Burr, Executor, and Samuel H. Lucas. } In error to the Court of Appeals of the District of Columbia.

[February 23, 1903.]

Mr. Justice Brewer delivered the opinion of the Court.

Plaintiffs in error, caveators in the trial court, seek a review of the order of the Supreme Court of the District, holding a special term for orphans' court business, in admitting to probate the will of Ezra W. Leach. The order was entered March 17, 1900, and on appeal was sustained by the Court of Appeals of the District, November 6, 1900. (17 D. C. App. 128.) Thereupon this writ of error was sued out.

Whatever may have been the fact theretofore, it is not seriously questioned that by the act of June 8, 1898, (30 Stat. 434,) the trial court had jurisdiction to entertain the application for probate, for by section 2 of that act it is provided that "plenary jurisdiction is hereby given to the said court holding the said special term to hear and determine all questions relating to the execution and to the validity of any and all wills devising any real estate within the District of Columbia, and of any and all wills and testaments properly presented for probate therein, and to admit the same to probate and record in said special term." The specific objection to its action is an alleged defect in the publication required in case any party in interest is not found, the statute(sec. 6) providing that the court "shall order publication at least twice a week for a period of not less than four weeks of a copy of the issues and notification of trial in some newspaper of general circulation in the District of Columbia, and may order such other publication as the case may require." The order was made on January 26, 1900, setting the hearing for February 26, 1900, and was "that this order and a copy of said issues heretofore framed shall be published twice a week for four weeks in The Evening Star." Publication was made January 26 and 30, February 2, 6, 9, 13, 16 and 20. There were, therefore, two publications in each successive seven days from the date of the order. January 26 was on Friday. The contention is that the word "week" means that series of days called a week commencing Sunday and ending Saturday, and that under this construction there was only one publication in the last week. *Ronkendorff* v. *Taylor's Lessee*, (4 Pet. 349,) is cited as authority.

In that case notice of a tax sale was required "by advertising once a week, in some newspaper printed in the city of Washington, for three months," and it was held that this did not require a publication on the same day in each week, the court saying (p. 361:)

"A week is a definite period of time, commencing on Sunday and ending on Saturday. By this construction the notice in this case must be held sufficient. It was published Monday, January the 6th, and omitted until Saturday, January the 18th, leaving an interval of eleven days; still, the publication on Saturday was within the week succeeding the notice of the 6th."

But the language of this statute is not "for four weeks," but "for a period of not less than four weeks, and the words of the order must be construed in the light of the statute." A like difference was called to the attention of the court in *Early* v. *Homans*, (16 How. 610,) where the publication was to be "once in each week, for at least twelve successive weeks," and commenting thereon it was said (p. 617):

"The preposition, for, means of itself duration, when it is put in connection with time, and as all of us use it in that way in our everyday conversation, it cannot be presumed that the legislator, in making this statute, did not mean to use it in the same way. Twelve successive weeks is as definite a designation of time, according to our division of it, as can be made. When we say that anything may be done in twelve weeks, or that it shall not be done for twelve weeks, after the happening of a fact which is to precede it, we mean that it may be done in twelve weeks or eighty-four days, or, as the case may be, that it shall not be done before."

Further, the object of a notice is to enable the parties affected thereby to be present and obtain a hearing. The caveators appeared and without seeking further time, for the purpose of securing additional testimony or preparing for the hearing, went to trial on the issues submitted to the jury. They at least cannot claim to be prejudiced by any defect in the notice.

But the substantial question is whether the court erred in taking the case from the jury and directing a verdict sustaining the will. The questions submitted for consideration were whether the testator was at the time of executing the will "of sound mind, capable of executing a valid deed or contract;" whether the will was "procured by the threats, menaces and duress exercised over him (the testator) by Samuel H. Lucas or any other person or persons," and whether it was "procured by the fraud of Samuel H. Lucas or any other person or persons."

Although jurors are the recognized triers of questions of fact, the power of a court to direct a verdict for one party or the other is undoubted, and when a court has done so and its action has been approved by the unanimous judgment of the direct appellate court, we rightfully pay deference to their concurring opinions. (*Patton* v. *Texas & Pacific Railway Company*,

179 U. S. 658, and cases cited.) An examination of the testimony satisfies us that there was no error in directing the verdict. The testator was seventy-three years old, white, childless, unmarried, his nearest relatives being cousins, the plaintiffs in error. He had lived in this District for at least twenty years. He was a man positive in his opinions, not easily influenced, of strong religious convictions and much attached to his church. His business was that of a florist. He owned two or three parcels of real estate of the value of about $8,000, and also a little personal property worth something like $300. The devisee was Samuel H. Lucas, a young colored man, with whom alone he had kept house for ten or a dozen years, such relation commencing at his invitation and continuing by his wish. For some years Lucas had the general management of the business. Testator's illness was brief, lasting only eight days. He died on December 21, 1896, between 12 and 1 o'clock. Early in the morning of that day, between 9 and 10 o'clock, the pastor of the church to which he belonged called, and to him he said:

"Pastor, I did not expect to go so early; there are some things which I wanted to perform and have neglected. I wanted give the church a parsonage. I cannot do it now; it is too late. I will be unable on account of the laws of Maryland, which apply to the District of Columbia, to do anything of that sort, for they will not allow a man to do anything of that sort within thirty days of the time of his death. I want you to prepare the papers and turn everything over to Sam."

Thereupon the pastor sent for a notary and prepared a deed conveying the real estate to Lucas. After that had been executed the pastor, who had never before prepared a deed, suggested that possibly he had not got everything in just right, and that if the testator wanted to make sure he could make a will. The testator then asked the notary to draw up a will, and it was drawn up and executed. At the time he directed the preparation of the deed he told Lucas what he would like to have done in reference to the parsonage, and Lucas replied that he would carry out his wishes. There was not a syllable of testimony, not a hint, that Lucas, or any other person, requested or suggested any disposition of the property. All that was done was done at the instance and upon the request of the testator. The caveators called four witnesses as to his mental condition, only one of whom was present at any time during his sickness, and that the pastor above referred to. So far from their testimony tending to show mental weakness, it was abundant and emphatic that he was a man of positive convictions, clear-headed, though perhaps eccentric in some views, but at all times fully capable of making his own contracts and attending to his own affairs. The testimony of the pastor who, as stated, was present on the morning of his death and detailed the circumstances of that interview, shows that his mind was then clear, that he knew what he was doing, and was simply attempting to carry out by the deed and the will that which

had been for a long time his intentions. Neither his attending physician, the notary, the executor, nor Lucas were called as witnesses, although all were present that morning. Evidently the caveators were content to rest their case in this respect upon the evidence of the pastor. Seven physicians were called who, upon a hypothetical question, substantially concurred that it was contrary to their experience and reading that a man seventy-three years of age, dying of acute pneumonia, should have testamentary capacity between three and four hours before death. The only evidence of the cause of his death was the certificate from the health department, which named as such cause broncho-pneumonia. One of these seven physicians testified (and he alone gave evidence in that respect) that the unconsciousness preceding death from acute pneumonia was not characteristic of death from bronchial pneumonia, and that the circumstances disclosed by the pastor would tend to show that there was not mental inability to make a valid deed or contract. That acute pneumonia, especially in one of his age, would ordinarily cloud the intellect for hours before death would be irrelevant to the question of his mental condition that morning, unless it was shown that he was suffering from such disease, and that does not appear.

From this direct testimony but one conclusion could be drawn, and that in favor of the mental soundness of the testator at the time he made the will. Nor is the caveators' case strengthened by that which counsel so forcibly presented to our attention, to wit, the right of a jury to take into consideration that which is common knowledge and springs from the ordinary experiences and relations of life. The testator was a white man, the devisee colored, and race prejudice we all know exists. But this testator, eccentric in his views and of positive convictions, is shown to have made this colored man his business and household companion for years. Such continued intimacy, excluding other parties therefrom, is satisfactory evidence that he at least was not moved by such prejudice. The potency of blood relationship is also appealed to, but affection between cousins is often not very strong. The testator lived in this District while the caveators lived in New England, and the testimony fails to show that he visited them or they him; that they ever even corresponded, or that the caveators ever manifested any interest in him or his until after his death, when they asserted a right to inherit his property.

Upon questions of this kind submitted to a jury the burden of proof, in this District at least, is on the caveators. (*Dunlop* v. *Peter*, 1 Cranch C. Ct. 403.) See also *Higgins* v. *Carlton*, (28 Md. 115, 143;) *Tyson* v. *Tyson's Executors*, (37 Md. 567.) The caveators in the present case failed to sustain this burden, and we are of the opinion that the trial court did not err in directing a verdict against them.

The judgment is *Affirmed*.